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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930.

No. ~~664~~ 47

FULLERTON LUMBER COMPANY, PETITIONER,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 14, 1930

CERTIORARI GRANTED MARCH 17, 1930

(34,795)

(34,795)

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

H. E. Byram, Mark W. Potter, and Edward J. Brundage, as Receivers of the Chicago, Milwaukee & St. Paul Railway Company, Plaintiffs,

vs.

Fullerton Lumber Company, a Corporation, Defendant

Complaint—Filed Dec. 9, 1927

For their complaint herein, plaintiffs allege:

I

That the defendants herein is a corporation organized and existing under and by virtue of the laws of the state of South Dakota, having its principal place of business at Minneapolis, Minnesota.

II

That the Chicago, Milwaukee & St. Paul Railway Company is a corporation organized and existing under the laws of the state of Wisconsin by law authorized to operate, and until the 18th day of March, 1925, operating various lines of railway in the states of Minnesota, Illinois, Wisconsin, South Dakota and other states, as a common carrier of merchandise by rail for hire, including a line of railway extending from Chicago, in the State of Illinois, to the City or Station of Kimball in the State of South Dakota.

III

That on the 18th day of March, 1925, in a cause then pending in the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein

Binkley Coal Company was plaintiff and the said Chicago, Milwaukee & St. Paul Railway Company was defendant, an order was duly made and entered appointing the above [fol. 2] named plaintiffs as receivers of all and singular the railroads and other property and assets, real, personal and mixed of every kind and description and wherever situated belonging to the said Chicago, Milwaukee & St. Paul Railway Company and authorizing and directing said receivers to manage and operate said railroads and property according to the requirements of the valid laws of the various states in which such railroads and property are situated, in the same manner that Railroad Company would be bound to do if in possession thereof; and further authorizing and empowering said Receivers to institute and prosecute in any court all such actions in their judgment necessary for the proper discharge of their trust as such Receivers.

IV

That thereafter and on the same day, in proceedings in aid of such receivership ancillary to the aforementioned cause, instituted in the District Court of the United States, for the District of Minnesota, Fourth Division, between the same parties, an order was duly made and entered appointing the above named plaintiffs as receivers with power and authority as aforesaid.

V

That thereafter and before the commencement of this action, the plaintiffs herein duly qualified and entered upon the discharge of their duties pursuant to each of said orders and have ever since been and now are acting as such receivers.

VI

That since the 18th day of March, 1925, plaintiffs as such receivers have at all times been in the control of and operating the lines of railway of said Railway Company pursuant to said orders, as a common carrier of freight in interstate commerce, for hire, and as such have complied with the requirements of the act of Congress entitled "An Act to Regulate Commerce" passed on February 4, 1887

and amendments thereof and supplements thereto; and have at all times complied with said acts, particularly with reference to the filing and publishing of tariffs fixing the rates for transportation of freight and regulations governing the application thereof.

VII

That this action arises and is based upon the act above mentioned and amendments thereof and supplements thereto.

[fol. 3]

VIII

That at Norfolk, West Virginia on or about the 9th day of June, 1926, Sastner, Curran & B delivered to the Norfolk and West Virginia Railway 10,400 lbs. of coal contained in N&W car 93360 for transportation over its line of railway and its connecting common carriers, including the line of railway of the plaintiffs above named, to Kimball, South Dakota. That said coal was billed and consigned to the defendant at Kimball, South Dakota.

That the said coal was duly transported by the Norfolk and West Virginia Railway and its connecting common carriers, including the plaintiff, to said Kimball, and on the 16th day of June, 1926, said coal was duly delivered to the defendant at said Kimball by the plaintiffs who were the delivering common carrier.

That the lawful charges due for such transportation at the time of said delivery to the said Fullerton Lumber Company at said Kimball was and is the sum of Three Hundred Seventy-five and 96/100 ($375.96) Dollars, no part of which has been paid and said Three Hundred Seventy-five and 96/100 ($375.96) Dollars is due and unpaid, said charges being shown more in detail in "Exhibit A" hereto attached and made a part hereof the same as though set out in full.

IX

That the defendant by reason of the foregoing became and now is lawfully indebted to the plaintiffs in the sum of Three Hundred Seventy-five and 96/100 ($375.96) Dol-

lars with interest thereon since the 16th day of June 1926.

Wherefore plaintiffs demand judgment against the defendant in the sum of Three Hundred Seventy-five and 96/100 ($375.96) Dollars with interest thereon as aforesaid, together with their costs and disbursements herein.

F. W. Root, C. O. Newcomb, & A. C. Erdall, Attorneys for Plaintiffs, 25 Milwaukee Station, Minneapolis, Minnesota.

[fol. 4] EXHIBIT "A" TO COMPLAINT

Delivery Receipt Form 72-T.W.

8629 Kimball, S. D.

Station 6/16 1926

Consignee Fullerton Lbr. Co. Freight

Destination Bill No. 374

Route N&W — Cels PH Chgo CM&STP

(Point of origin to destination)

Received of Chicago, Milwaukee & St. Paul Railway, the following described Articles in Good Order:

H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers

Waybilled from	Waybill Date and No.	Full Name of Shipper	Car Initials and Number
Norfolk, W. Va.	6/9 1937	Castner, Curran & B	N&W 163300
Point and date of shipment.	Connecting Line reference.	Previous Waybill references.	Original car initials and number.

Number of packages, Articles and Marks	Weight	Rate	Freight	Advances	Total
Rom Coal	10400	72 3	375.96		
Wghts as Pert — Ohio 1342					
410					
1022					
R/W Mitchell 1115					
410					
1040					
			Total		375.96

Date of Delivery 6/16 1926.

Receipt of Property Acknowledged:

Fullerton Lbr. Co., consignee
Per J. E. Yaresh

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed Jan. 3, 1928

For its Answer to the Complaint herein Defendant alleges as follows:

I

Admits the allegations contained in Paragraphs I, II, III, IV, V, thereof.

[fol. 5]

II

Admits that since March 18th, 1925, Plaintiffs have been in control of and operating the lines of railway of the Chicago, Milwaukee & St. Paul Railway Company, as a common carrier in interstate commerce, for hire, and alleges that Defendant has no knowledge or information sufficient to constitute a belief as to all other matters alleged in Paragraph VI of said Complaint and Defendant therefore denies the allegations of Paragraph VI of said Complaint, except as herein specifically admitted.

III

Defendant denies the allegations of Paragraph VII of said Complaint.

IV

Admits that a carload of coal was transported substantially as alleged in Paragraph VIII of said Complaint, in subparagraphs one and two of said Paragraph VIII, except that Defendant denies that said car was duly transported and alleges that the manner and form in which the same was transported by Plaintiffs or their agents was negligent and caused loss and damage thereon and that said loss and damage was paid for by Plaintiffs.

Except as herein expressly admitted, Defendant denies the allegations contained in Paragraph VIII of said Complaint.

V

Denies the allegations of Paragraph IX of said Complaint.

VI

Defendant specifically denies that it is indebted to Plaintiffs in any sum whatsoever, whether on account of the matters in said Complaint alleged or otherwise, and Defendant alleges that before this action was brought De-

fendant fully paid and satisfied and discharged the claim in said Complaint alleged by full and complete payment thereof, and of the whole thereof, less a deduction agreed upon between the parties and paid by Plaintiffs to Defendant on account of improper carriage of said carload or coal and because of improper overcharge therefor.

VII

Denies each and every allegation, matter, statement and thing in said Complaint contained, save as herein admitted, qualified, or otherwise alleged.

[fol. 6] Wherefore Defendant prays that Plaintiffs take nothing on account of the matters alleged in said Complaint, that the same be dismissed, together with costs and disbursements to Defendant. Dated, January 3, 1928.

Stanley S. Gillam, Attorney for Defendant, 1014 Metropolitan Life Bldg., Minneapolis, Minnesota.

(Endorsed:) Service admitted this 3rd day of January, 1928. F. W. Root, C. O. Newcomb, & A. C. Erdall.

[File endorsement omitted.]

In United States District Court

Stipulation for Filing of Reply and Order Thereon

It is hereby stipulated by and between the above entitled parties that the attached Reply of the plaintiffs may be filed in the office of the Clerk of the above entitled Court without further notice to the defendant.

Dated February 6, 1928.

F. W. Root, C. O. Newcomb, & A. C. Erdall, Attorneys for Plaintiffs. Stanley S. Gillam, Attorney for Defendant.

Order

Pursuant to the above stipulation it is hereby ordered that the Clerk of this Court may, and he is hereby directed

to file in his office as a part of the record in the above entitled case the attached Reply.

By the Court:

Wm. A. Cant, Judge.

Dated February 16, 1928.

In United States District Court

Reply—Filed Feb. 16, 1928

Come now the plaintiffs and for their reply to the answer of the defendant herein, allege and show as follows:

[fol. 7]

I

Allege that in the afternoon of Saturday, the 19th day of June, 1926, one of the defendant's agents delivered to the plaintiffs' Agent at Kimball, South Dakota, defendant's check No. 738, dated June 19, 1926, in the sum of Three Hundred Seventy-five and 96/100 ($375.96) Dollars, payable to the Chicago, Milwaukee & St. Paul Railway. That said check, marked "Exhibit B" including all endorsements is hereto attached and made a part hereof, the same as though set out in full. That said check was duly presented to the Lombard State Bank, the bank upon which said check was made, and said Bank refused payment upon said check.

II

Plaintiffs further allege that they have never received any money whatsoever on said check and have never received the freight and other charges on said shipment, although they duly demanded that the defendant herein pay said charges before the commencement of this suit.

III

Save as hereinbefore specifically admitted or alleged plaintiffs deny each and every allegation, matter, fact and thing contained in the answer of the defendant herein.

Wherefore, plaintiffs pray for judgment as in their complaint demanded.

Dated February 6, 1928.

F. W. Root, C. O. Newcomb, & A. C. Erdall, Attorneys for Plaintiffs, 25 Milwaukee Station, Minneapolis, Minnesota.

EXHIBIT "B" TO REPLY

Face of Check

9 No. 738.

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

6/19/1926.

Pay to the order of C. M. & St. P. Ry. Co. $375.96 Three Hundred Seventy Five and 96 100 Dollars.

[fol. 8] Collectible at par through the Federal Reserve Bank of Minneapolis

To the Lombard State Bank, 78-196 Kimball, South Dakota.

Fullerton Lumber Company, by J. E. Yarosh.

Back of check: G. T. Gustafson, Agt. C. M. & St. P. Ry., 8629 Kimball, S. D. Pay to the Order of any Bank, Banker or Trust Co. All prior endorsements guaranteed Jun 23, 1926. Federal Reserve Bank 17-8 Minneapolis 17-8. Cancelled 17. Pay to the order of any Federal Reserve Bank. Jun 22, 1926. Central Trust Company of Illinois, Chicago, Illinois. 2-23. C. C. Haftner, Assistant Cashier. Pay to the Order of Central Trust Company of Illinois, Chicago, Illinois. For Credit to A. H. E. Byram, Mark W. Potter, and Edward J. Brundage, Receivers; Chicago, Milwaukee & St. Paul Railway Company, A. G. Loomis, Treasurer, Receivers. Cancelled.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

STIPULATION WAIVING JURY AND AS TO CERTAIN FACTS—
Filed Nov. 13, 1928

It is hereby stipulated by and between the above entitled parties that the above case may be tried before the above entitled Court without a jury and jury is waived by each of said parties.

[fol. 9] It is further stipulated by and between the above entitled parties that since the commencement of said action, all of the property of the Chicago, Milwaukee & St. Paul Railway Company, which was under the control and being operated by H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers of the said Railway, including choses in action and unliquidated claims, were duly sold, assigned and delivered to the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, a corporation duly organized and existing under and pursuant to the laws of the State of Wisconsin.

It is further stipulated that since the 13th day of January 1928 all of the property formerly owned by the said Chicago, Milwaukee & St. Paul Railway Company has been and now is being operated and is now owned and controlled by the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

It is further stipulated that all the right, title and interest of H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers of the Chicago, Milwaukee & St. Paul Railway Company and of the said Chicago, Milwaukee & St. Paul Railway Company, is now and ever since the said 13th day of January has been vested in the Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

And it is stipulated that the said Chicago, Milwaukee, St. Paul & Pacific Railroad Company may be substituted as plaintiff in place of the above entitled plaintiffs and judgment, if any shall be ordered in favor of said plaintiffs, may be entered in favor of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and any judgment, if any shall be ordered in favor of the defendant, may be entered as

against the Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

Dated November 13, 1928.

F. W. Root, C. O. Newcomb, & A. C. Erdall, Attorneys for Plaintiffs. Stanley S. Gillam, Attorney for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING PARTY PLAINTIFF—Filed Nov. 13, 1928

Pursuant to the above entitled stipulation it is hereby Ordered that the Chicago, Milwaukee, St. Paul & Pacific Railroad Company is hereby substituted as plaintiff in the [fol. 10] above entitled case in place of H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers of the Chicago, Milwaukee & St. Paul Railway Company; in the event that it is found that the above entitled plaintiffs or their substituted plaintiff are entitled to judgment in said case, in such event judgment shall be entered in favor of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company and it is further ordered that if judgment in this case shall be found to be in favor of the above entitled defendant, judgment shall in such case be entered as against the Chicago, Milwaukee, St. Paul & Pacific Railroad Company, the substituted plaintiff.

Dated November 13, 1928.

Chas. A. Dewey, Judge U. S. District Court.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF TRIAL NOVEMBER 13, 1928

Before Judge Charles A. Dewey

The above entitled action came on this day to be tried to the Court; the plaintiff herein appearing by A. C. Erdall, Esq., and the defendant appearing by Stanley S. Gillam, Esq.

Mr. Erdall states the case to the Court on the part of the plaintiff.

Mr. Gillam states the case to the Court on the part of the defendant.

Forest T. Gustafson is sworn, is examined and testifies as a witness on the part of the plaintiff.

John Dickie is sworn, is examined and testifies as a witness on the part of the plaintiff.

Forest T. Gustafson is recalled, is examined and further testifies as a witness on the part of the plaintiff.

Here the plaintiff rests its case.

J. E. Yarosh is sworn, is examined and testifies as a witness on the part of the defendant.

Here the defendant rests.

[fol. 11] Forest T. Gustafson is recalled, is examined and further testified as a witness on the part of the plaintiff.

John Dickie is recalled, is examined and further testifies as a witness on the part of the plaintiff.

Here the plaintiff again rests its case and the testimony is closed.

Mr. Erdall sums up the case to the Court in part on behalf of the plaintiff.

Mr. Gillam sums up the case to the Court in part on behalf of the defendant.

Mr. Erdall concludes the summing up of the case to the Court on behalf of the plaintiff.

Mr. Gillam concludes the summing up of the case to the Court on behalf of the defendant.

Said case is submitted to and taken under advisement by the Court;

Plaintiff to file a brief and defendant to file its brief on or before November 19th, 1928.

Filed November 13, 1928. Joel M. Dickey, Clerk By Thomas H. Howard, Deputy.

IN UNITED STATES DISTRICT COURT

No. 2091. At Law

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, Plaintiff,

vs.

FULLERTON LUMBER COMPANY, Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Nov. 20, 1928

The above entitled action having come on for hearing on its merits in open court on the 13th day of November, 1928, [fol. 12] before the court without a jury, a jury having been duly waived by the parties in writing, evidence is introduced and the cause argued and submitted, and the same having been duly considered the Court makes the following findings of fact and law:

That since the commencement of this action all of the property which has been in the hands of the receivers was transferred to this plaintiff and by order duly entered of record this plaintiff has been submitted as party plaintiff in this action.

That the original plaintiff was engaged in interstate commerce and on or about June 17, 1926, received a car of coal consigned to the defendant. The car was delivered to the defendant company on June 17, 1926 and released by it about 5 o'clock P. M. June 19, 1926.

The agent of the receivers presented a freight bill to the defendant company about three o'clock P. M. June 19, and a check for the amount of the freight in the sum of $375.96 was duly delivered to the agent accepted by him as payment therefor and the freight bill duly receipted as paid by said agent.

Said freight was received and paid for at the town of Kimball, S. D., and the check in payment of the freight charge was made against the account of the defendant company in the Lombard State Bank whose place of business was at that time in Kimball, S. D.

The check was not presented for payment at the Lombard State Bank on the date of its receipt or the succeeding day

as was the custom of the agent of the plaintiff company at that time, but under directions of the officers of the plaintiff company was sent to the Central Trust Company of Chicago for collection, and was not presented to the Lombard State Bank for payment until after that bank had closed its doors on June 25, 1926.

Both parties were aware of the fact that the Lombard State Bank was not in the best of financial circumstances at the time of the execution of the check, and same was sent to the Central Trust Company of Chicago for collection under the direction of the officers of the company as they were unwilling to trust a transfer of the payment of the account to a draft drawn on the Lombard State Bank.

The check has never been paid, and this action is brought and the claim made that the freight bill above referred to [fol. 13] has never been legally paid, as the agent of the plaintiff company and the company itself was without authority to receive anything but cash in the payment of freight bills.

It is plaintiff's claim that under an act of Congress entitled an Act to Regulate Commerce, passed on February 4, 1887, and amendments thereto, the company was without legal authority to accept the check in payment of the freight bill, and as the same was not paid in cash the bill has not been paid. And by reason thereof asks for judgment against the defendant for the amount of the freight bill yet due.

Defendant's claim is that the plaintiff, through its officers and agents were negligent in not presenting the check for payment, and that under the law merchant the freight bill has been paid and discharged.

The Interstate Commerce Commission adopted a rule dated September 15, 1906 known as Conference Ruling 207, reading as follows:

"207. Payment for Transportation.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates or fares in effect at the time, precludes the acceptance of service, property, or other

payment in lieu of the amount of money specified in the published schedules."

The foregoing rule of the Interstate Commission has the force and effect of United States statute, and it must follow that the payment of the check was unlawful and that the plaintiff herein is entitled under the law to recover in this suit the charges for the freight which have never been legally paid. L. & N. Ry. Co. vs. U. S. 219 U. S. 486; N. Y. C. & H. R. R. Co. vs. Gray, 239 U. S. 583; Eggleston vs. Plowman (S. D.) 207 N. W. 981.

This decision and the following judgment is made without prejudice to the defendant to bring an action against the Plaintiff or its assignor for loss resulting from the failure to present the check for payment within a reasonable time, or any other negligence or negligent acts on the part of this plaintiff or its assignor.

It is therefore the Judgment and order of the Court that the plaintiff have and recover as against the defendant a [fol. 14] judgment in the sum of $375.96 with interest thereon at six per cent from June 25, 1926 and costs of this suit. To all of which plaintiff excepts.

Signed at St. Paul, Minn. this 20th day of November, A. D., 1928.

Chas. A. Dewey, Judge.

[File endorsement omitted.]

In United States District Court

Judgment—Filed Nov. 22, 1928

Now, Therefore, by reason of the Premises aforesaid, it is considered, ordered and adjudged that said Plaintiff, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, do have and recover of and from said defendant, Fullerton Lumber Company, a corporation, the sum of Four Hundred Thirty and 35/100 Dollars ($430.35) together with its costs and disbursements in this behalf expended, to be taxed, and that said plaintiff do have execution therefor.

Upon motion of counsel for the defendant it is

Further ordered that all further proceeding herein except the taxation of costs and the entry of judgment therefor be and they are hereby stayed for a period of forty two (42) days from and after this date to enable this defendant to move for a new trial and to prepare and present a bill of exceptions under the provisions of Rule XXI of this Court.

A true record. Attest:
Joel M. Dickey, Clerk, by Thomas H. Howard, Deputy Clerk.

[File endorsement omitted.]

In United States District Court, District of Minnesota, Fourth Division

No. 2001. (Law)

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a Corporation, Plaintiff,

vs.

Fullreton Lumber Company, a Corporation, Defendant

Bill of Exceptions—Filed Feb. 23, 1929

Caption

This cause duly came on for trial in the District Court of Minnesota, Third Division, having been transferred by [fol. 15] Stipulation from the Fourth Division, before the Honorable Charles A. Dewey, United States District Judge, on the 13th day of November, 1928, without a jury, a jury having been waived by written stipulation.

Arthur C. Erdall, Esq., appeared as Attorney for Plaintiff and was present and conducted the trial on behalf of Plaintiff, and Stanley S. Gillam, Esq., appeared as Attorney for Defendant and was present and conducted the trial on behalf of Defendant.

Thereupon, the following proceedings were had, to-wit:

Appearances:

For the plaintiffs, Mr. A. C. Erdall.
For the defendant, Mr. Stanley S. Gillam.
Tried before Hon. Charles A. Dewey, Judge. Nell D. Needham, Reporter.

EVIDENCE ON BEHALF OF THE PLAINTIFF

FOREST T. GUSTAFSON, sworn by the Clerk, examined by Mr. Erdall, testified as follows:

Q. Your name is Forest T. Gustafson?
A. Yes sir.
Q. You are the agent of the Chicago, Milwaukee & St. Paul Railway Company at Kimball?
A. Yes sir.
Q. And you were agent of the receivers of that company in June, 1926?
A. Yes.
Q. How long prior to June 19, 1926, at Kimball?
A. The road was in the hands of the receivers when I went to work there, July 1, 1925.
Q. Now I will ask you whether or not you received a car load of coal consigned to the Fullerton Lumber Company in Northwestern car, No. 93360, about the middle of June, 1926?
A. Yes.
Q. Have you a record so you can show the date when that car arrived?
A. Yes.
Q. You have the original record here?
A. Yes.
Q. Will you refer to that original record? What is the record you are referring to?
A. Station demurrage record book.
[fol. 16] Q. Referring to that record, do you find the car number that I just mentioned?
A. Yes, sir.
Q. When did that car arrive at Kimball, S. D.?
A. At 2:50 p. m. June 16, 1926.

Q. Was the assignee notified that that car had arrived?

A. Our record shows: "Notified at 5:00 p. m. June 16."

Q. At five o'clock p. m. the same day?

A. Yes.

Q. What was done with the car with reference to its being placed for unloading?

A. It was not placed until 3:00 p. m. June 17, for the reason that we were unable to raise Fullerton Lumber Company to ascertain from them where car was to be spotted.

Q. In other words you could not get information from the Fullerton Lumber Company as to where they wanted the car spotted?

A. At that time.

Q. When was the car unloaded?

A. The record shows the car was released at 5:00 p. m. June 19.

The Court: What do you mean by "released"?

A. Well, that the car was emptied, as a rule, and in this case.

Q. When did you present a bill to them for freight to the Fullerton Lumber Company?

A. Some time during the afternoon of June 19. Probably between two and three o'clock p. m. I am not sure of the exact time.

Q. Now I show you Plaintiff's Exhibit A, and ask you what that is?

A. This is the freight bill covering this car of coal.

Q. That was the freight bill that you presented to them?

A. Yes.

Q. And on June 19, as shown, it was presented—it was presented you say, on June 19?

A. Yes, sir.

Q. Was that freight bill receipted or not?

A. Yes, sir.

Q. And in exchange for that freight bill what did you receive?

A. I received a check for $375.96.

Q. I show you Plaintiff's Exhibit B, and ask you what that is.

A. This is the delivery receipt covering this car of coal.

Q. This Exhibit B is a carbon copy of the Exhibit A?

A. Yes, sir.

Q. But on Exhibit B you have the endorsement "Fullerton Lumber Company, by Mr. Yarish" showing that he had received the car?

A. Yes.

Q. Now the $375.96, what did that cover?

[fol. 17] A. That covers the freight charges on that car. car.

Q. Moving from Norfolk, W. Va., to Kimball, S. D.?

A. Yes.

Plaintiffs offer in evidence Exhibits A and B. Admitted without objection.

The Court: When the check was given him he marked them paid and delivered them?

A. Yes.

Q. Now after you received the check from the Fullerton Lumber Company, what did you do with that?

A. I put it in my cash drawer.

Q. Where did you send it?

A. I remitted it to the Central Trust Company of Illinois at Chicago.

Q. Why did you send it to the Central Trust Company of Illinois at Chicago?

A. Because I was not sure of the condition of the Lombard State Bank, and I also had instructions, as I understood the instructions, to remit local checks along with currency, to remit direct to the Central Trust Company.

Q. Was the Central Trust Company of Illinois the depository in which you deposited your money?

A. Yes.

Q. Did you carry an account at the Lombard State Bank? Did you deposit your money and checks and leave them there so that you carried an account at any time?

A. I don't believe I understand your question.

Q. What I am getting at, prior to this particular period did you take checks and money to the Lombard State Bank and get a draft and deposit it in the Central Trust Company of Illinois at Chicago?

A. Yes.

Q. So that your depository was the Central Trust Company of Illinois at Chicago?

A. Yes.

Q. Whatever money you collected at that station you sent it in to the Central Trust Company of Illinois?

A. Yes.

Q. Did you make out deposit slips?

A. Yes, sir.

Q. Did you make out that deposit slip and send the money direct to that company in Chicago?

A. Yes.

Q. Had you always done that during your time as agent there, as to depositing the money collected?

A. Yes, sir.

Q. When you have—when did you send this check you have referred to? When did you send this check to the Central Trust Company of Illinois?

[fol. 18] A. I remitted it the morning of June 20th.

Q. That is the next morning?

A. Yes, the following morning.

Q. What train service did you have there at that time?

A. Our first east-bound passenger train was 10:35.

Q. You had one train a day east bound?

A. Yes.

Q. In order to send checks to Chicago, or express or mail to Chicago, it had to go out on the east-bound train?

A. Yes, sir.

Q. I show you plaintiffs' Exhibit C and ask you if that is the check that you refer to?

A. Yes.

Q. And that is the check that you sent to the Central Trust Company of Ill.?

A. Yes, sir.

Q. By what means did you send it there? By mail, or express, or how?

A. By express.

Q. And at that time what other funds did you send to the Central Trust Company of Illinois?

A. At that time there were several other checks.

Q. Will your cash book show that?

A. Yes, sir.

Q. Have you got it here?

A. Yes.

Q. Will your refer to that, please? State just what you sent in.

A. The Fullerton Lumber Company check $375.96, that was on the Lombard State Bank. Another check, O. G. Bradshaw's check for $124.16.

Q. That check was for freight charges, too, was it?

A. Yes, sir. Issued on the Lombard State Bank.

Q. What else did you send in?

Defendant objects as irrelevant.

Mr. Erdall: It is very short.

A. George Bray's check for $67.27. The balance was currency, $40.

Q. So that in addition to sending in these checks you sent $40 in current in your express package?

A. Yes.

Q. Previously, when you considered the bank in good condition, did you send currency to the Central Trust Company?

A. I exchanged station collections for drafts on the Lombard State Bank.

Q. You have the express receipt that shows your sending that money and checks on that day?

A. Yes.

Q. Have you referred to that and know that that is correct?

A. Yes, sir.

Plaintiffs offer in evidence Exhibit C.

Admitted without objection.

[fol. 19] Q. Mr. Gustafson, can you refer to your records and tell us what the correct amount of freight charges was on this particular shipment?

A. Yes, sir.

Q. What was it? Do you need any records to refresh your recollection?

A. Do you mean how I arrived at the amount?

Q. What the actual freight charges were and how you arrived at the amount.

A. Freight charges were based on 10,400 lbs lbs. R. O. M. coal. That is run of mine. At the rate of $7.23 per net ton.

Q. Then the freight bill of $375.96 is based on that charge?

A. Yes, sir.

Q. Do you know whether there was later a correction made on the [wright] of the coal?

A. Not as far as I recollect.

Q. As I understand it, the coal arrived there and the weight was given as shown on that freight bill?

A. Yes, sir.

Q. And the correct freight charges as shown under that freight bill were $375.96?

A. Yes, sir.

Q. And at that weight of coal, was that the correct freight charge?

A. Yes, sir.

Q. Have you ever received anything in payment of these freight charges in the way of money or cash in addition to this particular check that I have showed to you which is marked Plaintiff's Exhibit C?

A. No, sir.

Cross-examination.

By Mr. Gillam:

Q. This check for $375.96 you say that was sent by you to the Central Trust Company?

A. Yes sir.

Q. On Sunday morning?

A. Yes, I remitted it on Sunday morning.

Q. You will notice that on the back of that check there is an endorsement, "Pay to the order of the Central Trust Company of Illinois to the credit of the Receivers etc." Did you put that stamp on there?

A. No sir.

Q. You didn't put that stamped endorsement on there?

A. No sir.

Q. Your only endorsement was the written endorsement on there?

A. Yes sir.

Q. Then the stamped endorsement of the Receivers of the Milwaukee wasn't on there when you sent the check to the Trust Company?

[fol. 20] A. No sir.

Q. Do you know who put it on there?

A. No sir.

Q. Are you sure you sent that check to the Central Trust Company? Isn't it probable that you sent that to the home office of the company, the treasurer of the company, and that he endorsed that with that stamped endorsement?

A. No sir.

Q. You are sure you sent it to the Central Trust Company of Illinois at Chicago?

Q. For how long a time had you been sending local checks like that to Chicago?

Plaintiff objects as immaterial.

Objection overruled by the Court.

A. I would have to refer to my cash book. I am not sure.

Q. Had you sent any of the Fullerton Lumber Company checks to Chicago before the 19th of June?

A. I think not.

Q. This was the first one then that you sent in to Chicago, wasn't it?

A. Yes sir.

Q. You had been receiving checks from the Fullerton Lumber Company in payment of freight for quite a long time?

A. Yes, sir.

Q. Over a year?

A. Yes.

Q. Previous to this check on the 19th of June, what did you do with the checks of the Fullerton Lumber Company on the Lombard Bank?

A. I exchange them for a draft.

Q. You took them uptown to the bank?

A. Yes.

Q. And obtained a bank draft drawn on funds in Chicago or New York, I take it?

A. I don't know.

Q. A regular bank draft is what you got?

A. Yes.

Q. Didn't you deposit checks at the Kimball Bank at Kimball, S. D.?

A. Yes.

Q. You had an account there and you deposited checks there?

A. Yes.

Mr. Erdall: Are you sure you heard and understood that question, Mr. Gustafson?

[fol. 21] Q. Just to save time, while he is on cross-examination. I hand you Defendant's Exhibit 1, and ask you what that is.

A. Well, it is evidently a check for freight charges. Carload freight.

Q. Given to you by whom?

A. Mr. Yarosh.

Q. Given in payment of freight on a car or cars received by the Fullerton Lumber Company at your town of Kimball?

A. Well, I couldn't say unless I refer to my records.

Q. Will you look on the back of that check?

A. Yes sir.

Q. That check is endorsed by you?

A. Yes sir.

Q. When did you receive that check?

A. Well, I can't say unless I refer to my record.

Q. The check is dated isn't it?

A. As I read it, June 15, 1926.

Q. And was that check paid by the Lombard State Bank?

A. It is marked paid.

Q. What date?

A. June 15, 1926.

Q. That is the same day it is dated?

A. Yes.

Q. Now refer to your records if you don't recollect and tell us whether or not you received that check in payment for freight on or about the 15th day of June, 1926, and if you did how you handled that check in regard to its collection?

A. As near as I can tell from the notation I have there, I exchanged that for a Lombard State Bank draft—that check in with some other checks.

Q. You took that check, defendant's Exhibit 1, dated June 15, 1926, up to the Lombard State Bank the same day on which you received it, didn't you?

A. I have nothing to show but this check what this represents.

Mr. Erdall: Does your cash book show this particle item?

A. No sir.

Q. Well, it was for freight of some kind?

A. I presume so.

Q. Well, don't you know that? There is no question about that, is there?

A. I am quite positive it was.

Q. It couldn't be for anything else but freight, could it?

A. No.

[fol. 22] Mr. Gillam: In order to save time, I will have these 36 checks marked Defendant's Exhibit 2 (1 to 36 inclusive).

(Package of checks 1 to 36 inclusive is so marked by the Reporter).

Q. I show you now Defendant's Exhibit 2, 1 to 36 inclusive, which are checks, the first one of which is dated July 8, 1925, No. 548, and the last of which is dated May 25, 1926, No. 724, all of them purporting to be signed by J. H. Yarosh for the Fullerton Lumber Company, and payable to the Chicago, Milwaukee & St. Paul Railway Company, and ask you if all of these checks are endorsed by you?

A. Yes sir.

Q. Were any of these checks sent by you down to Chicago?

A. May I look at my cash record?

Q. Certainly.

(Witness leaves stand and examined record at table.)

A. No checks of the Fullerton Lumber Company on the Lombard State Bank were remitted to Chicago prior to June 19, 1926.

Q. That is, the check in controversy was the first one that you sent down to Chicago, wasn't it?

A. Yes sir.

Q. All of these other checks were presented by you the same day or the next day at Lombards were they not? I mean to their bank?

Question withdrawn.

Q. How did you handle these other checks, Mr. Gustafson?

A. Which other checks?

Q. The ones you hold in your hand, those 36 checks marked defendant's Exhibit 2?

Mr. Erdall: He wants the general way in which you handled them.

A. As a rule we exchanged them for bank drafts.

Q. And you did that the same day you got the checks did you not?

A. Well, I don't remember as to all these checks. I can't carry those in mind.

Q. How long did you keep these Fullerton checks in your cash drawer before you took them up to either the Kimball or the Lombard State Bank?

A. Possibly not over 24 hours, at the most.

[fol 23] Q. Are you familiar with the "paid" stamp of the Kimball State Bank?

A. Yes sir.

Q. Showing you check No. 548 for $220.30, one of the defendant's Exhibit 2, does that show the paid stamp of the Kimball State Bank on it?

A. Yes.

Q. What is the date of that?

A. July 9, 1925.

Q. When did you receive the check?

Mr. Erdall: We will concede that these checks were taken by him and that he obtained bank drafts to cover these checks and other funds and that the endorsement shown on them is the time when he received the draft, and the date of the check is substantially the time when he received them.

Mr. Gillam: And that the dates of the paid stamps by the two banks are substantially authentic?

Mr. Erdall: That is paid to the extent that they gave bank drafts for them.

Q. You said something about when you sent in this check dated June 19, 1926, that you were afraid of the condition of the bank there at Kimball. is that correct.

A. No, I was not sure of the condition of the bank, the Lombard State Bank.

Q. What was it, on which you based that?

A. Well, possibly on their statement, for one thing. Their statement that was given to me by the cashier.

Q. Had other banks closed in Kimball before this?

A. Yes sir.

Q. Were there other banks closing around you in various other towns?

A. Yes, I think they were.

Q. You knew about this, I take it?

A. I heard of several banks closing around there.

Q. That was before you sent this check into Chicago?

A. Yes, I believe so.

Q. When did the Lombard State Bank close?

A. About noon, June 25, 1926.

Q. That was the next Friday?

A. About noon, June 25, 1926.

Q. You say this check for $375.96, the one in controversy here, was given you by Mr. Yarosh between two and three o'clock on Saturday?

[fol. 24] A. I believe that is about the right time.

Q. Was it nearer two or nearer three o'clock?

A. I can't say exactly.

Q. Your train going west comes in there about three o'clock doesn't it?

A. Yes sir.

Q. And you, of course, have to be at the depot when the trains come in? And did at that time?

A. Yes.

Q. And for some little time previous to train time, in order to sell tickets?

A. Well, possibly

Q. You are usually there for an hour before the train arrives, are you not?

A. Yes sir, as a rule.

Q. So following your usual custom, it was about two o'clock that you got this check from Mr. Yarosh, wasn't it, rather than at train time?

A. I said I didn't know the exact time. I think it was around, between two and three o'clock.

Q. On Saturday, June 19, 1926, what time of day did the Lombard State Bank close for the day?

A. I don't know exactly.

Q. Don't you know what its banking hours were on Saturday?

A. I believe from 9:00 a. m. to 4:00 p. m.

Q. Four o'clock in the afternoon was the closing time?

A. Yes.

Q. How far was the Lombard State Bank from the Fullerton Lumber Company office?

A. Approximately two blocks and a half.

Q. Do you know how long it would take you to go from the Fullerton Lumber Company up there?

Mr. Erdall: Objected to as immaterial. I think it is self evident that it would take about two minutes.

Q. And was it about the same distance from the depot?

A. Just about.

Q. Defendant's Exhibit 3 is in your writing is it not?

A. Yes.

Q. That is a letter dated July 12, 1926?

A. Yes.

Q. And that was sent by you to whom?

A. It is addressed to the Fullerton Lumber Company, Minneapolis, Minn.

[fol. 25] Q. The second and third paragraph, or the body of the letter after the first paragraph refers to the matter in controversy, doesn't it?

A. Yes sir.

Defendant offers in evidence Defendant's Exhibit 1 and Defendant's Exhibit 2.

Admitted without objection.

Defendant offers in evidence Exhibit 3.

Admitted without objection.

Q. You have testified that you sent this check dated June 19, 1926, down to Chicago for two reasons. First, because you were afraid of the bank, of your local banks, and second, because of instructions which you received from Chicago. Is that right?

A. Because I was not sure of the condition of the Lombard State Bank, and from the instructions received, as I understood them, as to handling these local checks.

Q. What were those instructions?

A. I would have to refer to the letter to quote it exactly.

Q. Give your recollection of it.

Mr. Erdall: If you have the letter here you can refer to it, if you wish.

(Witness leaves stand to get letter.)

A. Is it necessary to read the entire letter?

Mr. Erdall: I think we better have the instructions themselves rather than his recollection of them.

(Letter is handed to Mr. Gillam.)

Defendant offers in evidence Defendant's Exhibit 4, being a letter of instructions dated June 16, 1926, from Mr. Loomis of Chicago.

Admitted without objection.

Q. And I understand your answer to the question is that you received that letter of instructions from Chicago?

A. Yes, sir.

Q. You had not sent in any of the Fullerton Lumber Company checks given you on the Lombard State Bank to Chicago prior to this one in controversy, had you?

A. No sir.

Q. That was the first one?

A. That was the first one.

[fol. 26] Q. Did you have an account at the Kimball State Bank?

A. Do you mean if I exchanged collections for bank drafts?

Q. No. Did you deposit money at the Kimball State Bank for the company?

Mr. Erdall: Did you have a book showing deposits? Did you have a regular account for the company, is what he means.

A. No.

Q. Why are so many of the checks in Exhibit 2 stamped with the stamp of the Kimball State Bank?

Plaintiffs object as irrelevant and immaterial.

The Court: Answer if you know. I don't know whether he would know about that.

A. I can't say without looking the checks up.

Q. You took them to the Kimball State Bank did you not?

A. Part of them.

Q. Why did you do that?

Mr. Erdall: I think it is immaterial. He says he had no account at either bank.

The Court: Is that the reason? Because you thought this bank was safer than the Lombard State Bank?

A. I don't remember what the circumstances were now, why we did that, without looking the matter up.

Q. Did the Chicago, Milwaukee & St. Paul Ry. Co. keep any money on deposit at either bank during all of the time you were there?

A. No. We just simply changed our collections for bank drafts.

The Court: Then sent the drafts in to the depositories as directed by the company?

A. Yes.

The Court: You don't mean that you had a depository there in Chicago, of your own, from your town?

A. No.

The Court: You sent that under the general directions of the railroad company as I understand, to the account of the railroad company?

A. Yes sir.

Redirect examination.

By Mr. Erdall:

Q. Both banks had had difficulties out there, had they not?

A. Yes.

[fol. 27] Q. The Kimball State Bank had had difficulty?

A. Yes.

Q. It had closed its doors something like a year before this time?

A. Yes.

Q. In your collections you had checks made on the Kimball State Bank and some times on the Lombard State Bank?

A. Yes.

Q. Some of the time you took all of your checks to the Kimball State Bank for drafts and sometimes to the Lombard State Bank for drafts?

A. Yes sir.

Q. At this particular time you considered the situation such that you didn't want to do business with either bank, is that it? At the time this check was presented to you on the 19th of June, 1926?

A. I don't know as I understand exactly what you mean.

Mr. Erdall: I will withdraw the question.

Witness excused.

JOHN DICKIE, sworn by the Clerk, examined by Mr. Erdall, testified as follows:

Q. What is your name?

A. John Dickie.

Q. What is your business?

A. Treasurer of the Chicago, Milwaukee & St. Paul Ry. Company.

Q. How long have you been treasurer of the company?

A. Since December, 1926.

Q. Prior to that time were you in the treasurer's office?

A. Yes sir.

Q. In June, 1926, what position did you hold?

A. I was assistant treasurer for the Receivers for the same company.

Q. At that time did the Receivers of the Chicago, Milwaukee & St. Paul Ry Co., have a bank depository in which they deposited funds?

A. Yes.

Q. What was that depository?

A. Central Trust Company of Illinois in Chicago.

Q. What was the method of handling funds that were collected and sent in by the agent to the Central Trust Company of Illinois, so far as the endorsement of the Chicago, Milwaukee & St. Paul Railway Company was concerned?

Or, I should say so far as the endorsement of the Receivers was concerned.

[fol. 28] A. They were furnished endorsement stamps. As a matter of identification. If the agents did not have the proper endorsement—on them.

Q. Now referring to Plaintiffs' Exhibit C, and calling your attention to the endorsement, "Pay to the order, etc., Receivers Chicago, Milwaukee, St. Paul Ry Co." Can you tell us where that was put on the check, as to whether it was put on by the bank?

A. It was put on there by the Central Trust Company of Illinois. This stamp marked "A" identifies this as the stamp the bank had. My stamp doesn't have the "A" representing the word "Agent".

Q. Did that check itself pass through your office prior to the time that payment was refused on it by the Lombard State Bank?

A. It did not.

Q. By referring to the check, will you tell us the manner in which that check was handled so far as the banks that it went through?

A. Well, it was endorsed over to the Federal Reserve bank, the date is, apparently, June 22, by the Central Trust Company of Illinois, and on June 23, was endorsed to any bank or banks by the Federal Reserve Bank of Minneapolis. They would send it out then to the Lombard State Bank for payment. Evidently when it arrived at Kimball the bank was closed on which it was drawn and it was returned to the Federal Reserve Bank and back to the Central Trust Company.

Q. Why was the check sent to the Federal Reserve Bank at Minneapolis?

A. Because Kimball, S. D., is in the Fourth Federal Reserve District.

Q. At least at that time, Kimball was in the district of the Federal Reserve Bank of which Minneapolis was the head?

A. Yes.

Q. Was it handled then in the usual way that checks are handled?

A. It was.

Q. I will ask you whether or not the Receivers, or their successors the Chicago, Milwaukee, St. Paul & Pacific Company have received anything for their freight except this check that you hold in your hand?

A. Not to my knowledge.

Q. That letter of instruction, Defendant's Exhibit 5, can you tell by whom that letter was written?

A. It was dictated by myself. It was signed by Loomis, treasurer for the Receivers.

Q. The initials on here, "J. D." are yours?

A. Yes sir.

Q. During the period involved here, and during the period a year prior to June 20, 1926, was it ever the custom [fol. 29] of the receivers of the C. M. & St. Paul Ry. Co., to deposit funds in any bank at Kimball, S. D.

A. It was not.

Q. And were the agents at Kimball, S. D., authorized to open an account at those banks?

A. They were not.

Cross-examination.

By Mr. Gillam:

Q. Did Mr. Gustafson have authority to send a local check on this Lombard Bank in to the Central Trust Company on the 19th day of June, 1926?

A. Yes.

Q. Had you instructed your other agents out there in South Dakota to send local checks on their local banks in to Chicago?

Mr. Erdall: Objected to as immaterial.

The Court: Objection overruled.

A. Where we had reason to believe that the banks were not in good shape we issued such instructions.

Q. Do you mean to interpret your letter of June 16, to Mr. Gustafson, as giving him authority to send local checks to Chicago?

A. Yes.

Q. Is that a very general practice?

A. It was at that time with reference to South Dakota banks, yes.

Q. Isn't it a fact that at that time your instructions all over South Dakota, with all those banks closing, that they were to send no local checks in, but were to get drafts on Chicago funds and to remit those drafts to Chicago?

A. No sir; those were not our instructions.

Q. You mean to say then, that Mr. Gustafson at Kimball, S. D., was instructed by your treasury department to take all local checks that he received at Kimball and send them in to Chicago?

A. He was to use his own discretion. To accept them from responsible corporations or individuals and otherwise to insist on currency for transportation charges.

Q. Of course you wanted checks from people who had funds?

A. Yes.

Q. But that hardly answers the question, does it? You mean to tell us that you, as the head of the treasury department there, or acting for it, instructed your South Dakota agents, at any rate in all places where the banks were shaky, to take local personal checks like this and send them clear into Chicago?

A. I did.

[fol. 30] Q. Have you had any other difficulties out there at other points in regard to closed banks?

A. Plenty of it.

Q. Would it not have been much wiser from the standpoint of the best interests of the railroad company to obviate the risk at once at each local station by there obtaining cash or a draft on a Chicago bank?

A. Well, the draft on the Chicago bank was no use to us if the bank that was issuing it was not in proper shape.

Q. How about the matter of currency?

A. The risk of shipping the currency was greater than the risk of these checks we considered.

Q. Of course in this case the risk of the Fullerton Lumber Company was very great, you can see that?

A. I can't see that, no. They were in just as good a position as we were or better. They had an account in the bank, we didn't.

Q. Your agent could have obtained the cash on that check the same day, could he not?

Plaintiffs object as argumentative.
Objection sustained.

The Court: You don't need to argue with the witness.

Q. At what other points than Kimball, before June 19, 1926, had you instructed your depot agents to send local checks into Chicago?

Mr. Erdall: Plaintiffs object as immaterial.
The Court: Objection overruled.

A. I can't answer that without my files. I haven't got them, but I have issued such instructions at other points.
Q. Very many?
A. Yes; I should judge we issued to 25 or 30 to 50. Maybe more, and subsequent to this, yes. Because western Iowa went bad after this time.
Q. Did you ever notify the Fullerton Lumber Company of that practice?
A. No.
Q. Did you ever notify any of your other shippers of that practice?
A. No sir.
Q. Isn't it a fact that you had issued instructions to your agents at Scotland, nearby, which was in about the same condition——
A. I really can't say without referring to the files.
Q. Have you any other letter or document besides this letter dated June 16, 1926, authorizing your agent at Kimball, S. D., to send a check in to Chicago?
[fol. 31] A. I don't think I have anything prior to that date.

Mr. Erdall: What took place afterwards would not be material.

Redirect examination.

By Mr. Erdall:

Q. You had had other experience of the same kind had you where checks had been handled in the way this check was handled that the bank closed and where the check was received on substantial shippers, who were good for the checks?

A. Yes.

Q. Did you collect the amounts of the checks?

A. We did.

Q. Did you have the same situation with O. G. Bradshaw who had a check on that particular day?

A. Yes.

Q. Has the bank received the money on that check?

A. I do not believe so.

Q. You are not familiar with the proceeding they had in South Dakota where they did collect on that check?

A. No; I am not.

Q. The Fullerton Lumber Company was considered as a good, responsible concern by the Railway Company?

A. Yes. We looked them up in our Dunn and Bradstreet reference books and found that they were a good concern.

Q. You knew that many of these shippers in that community did have accounts in the local banks?

A. No; I did not. That is something we don't know much about.

Q. Did you have any such information that you felt you could advise shippers that you didn't consider any particular bank, such as the Lombard State Bank, wasn't good pay, or wasn't in good shape?

A. No; that wouldn't be proper information for us to give out.

Q. Is there anything else you can think of in connection with this transaction that would be helpful, Mr. Dickie?

A. No; I think the ground is covered pretty fully.

Recross-examination.

By Mr. Gillam:

Q. You brought a file with you of that over charge, over payment claim?

A. Yes, I did.

Q. Without going into detail about it, your office did pay, gave a check for $4.00 and some cents to the Fullerton Lumber Company in payment of that claim, did it not?

[fol. 32] A. There is a draft issued by the auditor of freight accounts in payment of a claim. I got your wire just as I was leaving. I know nothing about it.

Q. That was the claim for over payment by the Fullerton Lumber Company on this particular shipment?

A. I believe so.

Q. And at the time your office paid that claim for over payment they had received no other payment than this check for $375.96 which is in controversy? That is the only payment?

A. This check had been issued in payment of the freight bill.

Q. And you had received no other payment from the Fullerton Lumber Company at the time your office paid back this four dollars and some cents for over payment? That is true, isn't it?

A. Yes.

Redirect examination.

By Mr. Erdall:

Q. That was issued by another department, was it not, Mr. Dickie?

A. Yes.

Q. After this check had been received and the freight bill receipted by Mr. Gustafson, the agent, where was that sent?

A. To our over-charge claims, by the Fullerton Lumber Company.

Q. There was some difference of opinion as to the weight of the shipment, as I understand it?

A. Just from looking at the papers this morning, yes.

Q. As you understand it the correct amount of freight was $375.96 minus this check for $4.26?

A. Yes sir.

Witness excused.

Mr. Gustafson recalled.

Examined by Mr. Erdall:

Q. In order that there be no misunderstanding, you say you sent this check in controversy by express. What express? What company?

A. American Railway Express.

Q. Yes, I understand that. Is that an express company that operates over pretty nearly every railroad in the United States?

A. Yes.
Q. It is not a Milwaukee Railroad property?
A. No sir.

[fol. 33] Witness excused.
Plaintiff rests.

EVIDENCE ON BEHALF OF THE DEFENDANT

J. E. YAROSH, sworn by the Clerk, examined by Mr. Gillam, testified as follows:

Q. You are the Fullerton Lumber Company agent at Kimball, S. D.?
A. Yes.
Q. You were their agent in June of 1926?
A. Yes.
Q. And have been their agent ever since?
A. Yes.
Q. For how long prior to that time were you their agent there?
A. Since they owned the yards.
Q. How long ago is that?
A. Since 1922.
Q. Showing you Plaintiffs' Exhibit C, being the check dated June 19, 1926, of the Fullerton Lumber Company, check No. 738, is that your name signed to that check?
A. Yes.
Q. When did you deliver that check to Mr. Gustafson?
A. On June 19, around two o'clock.
Q. Did he come there to the lumber yard?
A. Yes.
Q. And had the freight bill with him?
A. Yes.
Q. You gave him that check and he receipted the freight bill?
A. Yes sir.
Q. Showing you Plaintiffs' Exhibit A, I will ask you if that is the freight bill he had with him that afternoon?
A. It is.
Q. Did he receipt the freight bill and hand it to you?
A. Yes.

Q. And in return for that receipted bill you handed him the check Exhibit C?

A. I did.

Q. When did you first learn that that check had not been paid by the bank?

A. On June 29.

Q. What did you do when you received that notice?

Mr. Erdall: Plaintiffs object as incompetent, irrelevant and immaterial.

[fol. 34] The Court: Taken subject to the objection.

A. I went right down to the depot to see Mr. Gustafson.

Q. Did you have a conversation with Mr. Gustafson?

A. Yes.

Q. At the depot?

A. Yes.

Q. And on what date?

A. That was on June 29.

Q. What was that conversation?

Mr. Erdall: Objected to as incompetent, irrelevant and immaterial.

The Court: Taken subject to the objection.

A. I asked Mr. Gustafson what he did with our check.

Q. Meaning this check, Exhibit C?

A. Yes. And Mr. Gustafson told me that he sent it to Chicago. I asked him what he did that for and he told me that he didn't want to embar-ass the bank. I told him, why didn't he say something, I could have got him the cash from the bank.

Q. What else was said?

Mr. Erdall: Same objection.

A. That was all.

Q. At the time you gave that check on the 19th of June, 1926, did you have several hundred—Did you have sufficient funds in the Lombard State Bank with which to pay the check?

A. Yes sir.

Q. Did you continuously have sufficient funds there up until the day that the bank closed?

A. Yes sir.

Q. Now Mr. Yarosh, referring to the Defendant's Exhibit 1, the check of the Fullerton Lumber Company dated June 15, 1926. Is your name signed to that?

A. Yes.

Q. To whom did you deliver that check?

A. To the agent, Mr. Gustafson.

Q. In payment for what?

A. This covered two cars of coal.

Q. Handing you Defendant's Exhibit 2, which comprises 36 checks, dated from July 8, 1925 to May 25, 1926. I will ask you if your name is signed to these checks?

A. Yes sir.

Q. These checks were all given to Mr. Gustafson in payment of freight?

A. I think they were, yes.

[fol. 35] Q. They were all made payable to the Chicago, Milwaukee, & St. Paul Railway Company and given to Mr. Gustafson?

A. Yes.

Q. That is true of all the checks we have here this morning?

A. Yes sir.

Q. These checks are all made on the same form?

A. Yes.

Q. And handed in the same way to Mr. Gustafson in return for receipted freight bills?

A. Yes.

Q. You are acquainted with the paid stamps of the two banks at Kimball?

A. Yes sir.

Q. You know that these paid stamps are the authentic paid stamps of each bank on every one of these, which ever bank it is?

A. Yes.

Q. And you received all these checks back in due course from the Lombard State Bank with your statement I take it?

A. Yes.

Q. Did you ever have any notice before the 29th of June from Mr. Gustafson that he was sending your checks to Chicago?

A. No, sir.

Q. What was his practice in handling the checks so far as you knew it?

A. To cash them the same day or the next day there in town.

Q. At Kimball, S. D.?

A. Yes.

Q. I suppose you obtained that knowledge from your paid checks?

A. Yes, sir.

Q. You had been paying these freight bills by check for at least a year, I take it, according to the date on these checks in Exhibit 2, going back to July of 1925?

A. Yes.

Q. Had you ever had any difficulty before with regard to the collection of these checks with Mr. Gustafson?

A. No, sir.

Q. They had all gone through in the regular way?

A. Yes.

Q. And you had always paid them by check?

A. Yes.

Q. Did he ever ask you to give him currency?

A. No, sir.

Cross-examination.

By Mr. Erdall:

Q. The Fullerton Lumber Company had an account, through you, as agent, with the Lombard State Bank?

A. Yes.

Q. You got statements from the bank as to what cash they had on hand, etc.?

A. Yes, sir.

[fol. 36] Q. So you were familiar with the conditions as they existed at that bank?

A. In a general way.

Q. Did you cash any checks at the Lombard State Bank after June 19, 1926 and up to June 25?

A. Yes, sir.

Q. Have you a record as to what those checks were?

A. Yes, sir.

Q. Have you that with you?

A. I think Mr. Gillam has it.

Q. What checks did you cash at the Lombard State Bank after June 19, or from June 19, to June 25, 1926?

A. I could not say without looking up my record.

Q. You will be here this afternoon?

A. Yes, sir.

Q. Will you look that up during the noon hour?

A. Yes, sir.

It is conceded by the parties that the check in controversy went to Chicago on the first passenger train going east after the check was received by the agent of the railroad company.

Noon Recess.

Cross-examination of Mr. Yarosh by Mr. Erdall resumed:

Q. Did you check up during the noon hour to see what checks were actually cashed on the Lombard State Bank from June 19 to 25, inclusive?

A. Yes, sir.

Q. What checks did you cash?

A. Cashed one for $50 on the 23rd day of June, and on the 24th one for $20.55, and another one for $300 on June 24th.

Q. Do you have your record here showing those items?

A. Yes, I just took it off of the report there.

Q. Could I see it?

(Mr. Gilliam shows Mr. Erdall record.)

Q. These three checks you refer to, they were all checks that were cashed for the Fullerton Lumber Company?

A. They were drawn on its account at the bank.

Q. Are you in any way connected, or were you connected with the Lombard State Bank? Were you a stockholder or anything of that character?

A. No, sir.

Q. Now on that $300 item, you exchanged that for a draft on the bank?

A. Yes, sir.

Q. Did you actually get the cash on that?

A. I bought a draft with it.

Q. Was the draft cashed? You got a draft from the Lombard State Bank for $300, did you receive the $300 on the draft, or not?

[fol. 37] A. I think that draft got caught. I don't think that draft got through.

Q. You think that draft did not go through before the bank closed?

A. No.

Q. So far as the checks which you actually received cash on, there was one for $50 on June 23, and one for $20.55 on June 24?

A. I think that is correct.

Redirect examination.

By Mr. Gillam:

Q. This $300 check here between the 21st and the 23rd of June, 1926, you don't know whether that $300 draft went through or not, do you?

A. It may have. I don't think it went through. That is my recollection. I am not sure about that.

Q. Did you make a deposit in the Lombard State Bank after June 19?

A. Yes, sir.

Q. About when was that deposit made?

A. I made a deposit on about the 23rd.

Q. For how much?

A. Right around $300. Right close to $300. $286.88.

Q. You deposited that in the Lombard State Bank on the 23rd of June?

A. Yes, sir.

Q. Now these checks that you have testified about were ordinary checks made in the due course of business, were they?

A. Yes, sir.

Q. They were payable to different persons?

A. Yes.

Q. None of them were payable to the Fullerton Lumber Company?

A. No.

Q. They were in payment of various items for which the Fullerton Lumber Company was indebted at Lombard?

A. Yes, sir.

Q. Were you a depositor in the Lombard State Bank?

A. A little bit, yes.

Q. About how much did you have on deposit there when it closed?

A. This check that I got caught with and about $100 or $150 more.

Q. You filed your claim for your deposit against the Receiver of the bank?

Mr. Erdall: Objected to the question as immaterial.

The Court: Taken subject to the objection.

Q. Have you ever been paid anything on account of your claim against the Lombard State Bank?

A. No.

[fol. 38] Q. Has the Lombard State Bank ever paid any dividends of any kind since it closed?

A. No, sir.

Q. You are familiar with the banking situation there?

A. Yes, sir.

Q. Are you on the committee of one of the other closed banks?

A. I am.

Q. What kind of a committee is that?

Mr. Erdall: Objected to as immaterial.

A. Depositors' committee.

Q. Of what bank?

A. The Commercial Bank.

Q. That bank previously closed at Kimball?

A. Yes.

Q. Has that bank paid any dividends?

Mr. Erdall: Same objection.

The Court: Taken subject to the objection.

A. No, sir.

Q. Have you checked up as to whether the Lombard is likely to pay any dividends?

Mr. Erdall: Objected to as incompetent, irrelevant and immaterial, no proper foundation laid.

The Court: Taken subject to the objection.

A. I have somewhat.

Q. With whom have you checked up on it?

A. With the examiner in charge.

Q. You have done that in your capacity as a depositor of the Lombard State Bank?

A. Yes.

Q. What are the possibilities of a dividend there?

Mr. Erdall: Objected to as incompetent, irrelevant and immaterial and calling for testimony based on hearsay.

The Court: Taken subject to the objection, if counsel insists.

A. The best information I could get on that, it will probably be somewhere between 10 and 12 per cent.

Q. But there has been no dividend paid of any kind since it closed?

A. No.

Q. Have you, as a depositor of the bank, received any notice as to when a dividend will be paid?

A. No.

Q. So far as you know as a depositor there is no present likelihood of a dividend, so far as any notice having been given to you, as a depositor, is concerned?

A. No, sir.

[fol. 39] Q. Did you file a claim on behalf of the Fullerton Lumber Company?

A. Yes.

Q. Has anything been paid on that claim?

A. No, sir.

Q. What is the amount of the Fullerton Lumber Company claim?

A. I couldn't tell you offhand. We took our balance in the bank less this check drawn in favor of the railroad company.

Q. And you filed a claim for that?

A. Yes.

Q. Did that claim include this $300 that you drew out to buy a draft with?

A. Yes, sir, I think it did. At the time we filed the claims it is my recollection we filed it for that, too.

Q. Did you have any knowledge up to the day it closed of a likelihood that this bank would close?

A. I didn't.

Q. You did business with it on the same basis that you had always done?

A. Yes.

Q. You made this deposit of $286.88 and drew checks in the usual course of business? That is a fact, is it?

A. Yes, sir.

Q. On the 19th day of June, 1926, did Mr. Gustafson say anything to you about currency in payment of the freight bill? Did he ask you for currency?

A. No, sir.

Q. Did he at any previous time?

A. No sir.

Q. Nothing was ever said by him about currency?

A. No, sir.

Q. He never demanded cash, or currency, from you in payment of freight bills?

A. No, sir.

Cross-examination.

By Mr. Erdall:

Q. When you presented your claim to the Lombard State Bank, you say you took the total amount of your deposit with the bank on the day it closed and deducted $375.96 from that amount and then made claim for the balance?

A. We left out the amount of this check to the railroad company.

Q. You took the total amount of the deposit you had in the bank on June 25, deducted the amount of this check from that and made a claim for the balance? Is that right?

A. Yes.

Redirect examination.

By Mr. Gillam:

Q. This $375.96 was deducted at the time the check was given, wasn't it?

[fol. 40] A. Of course our account would show that much less whenever we drew a check to the railroad company for freight. Our bank balance was reduced that much.

Q. At the time the check was drawn?

A. Yes, we just made our claim.

Recross-examination.

By Mr. Erdall:

Q. You made a claim for what was shown on your check balance after these various checks outstanding had been deducted, and you made a claim for that amount?

A. Yes.

Witness excused.

Mr. Gustafson is here recalled for further Direct Examination by Mr. Erdall:

Q. I show you Plaintiffs' Exhibit D and you may state what that is.

A. It is remittance slip covering itemized statement of checks and currency remitted to the Central Trust Company of Illinois.

Q. Is that the deposit slip that you referred to previously in your testimony?

A. Yes sir.

Q. That is the slip that you say you sent with these checks and the currency to the Central Trust Company of Illinois?

A. Yes.

Mr. Erdall: Plaintiffs offer in evidence Plaintiffs' Exhibit D.

Admitted without objection.

Q. Now after the bank had closed, did you tell Mr. Yarosh why you sent the checks to Chicago?

A. As I remember, I told him we had instructions to remit direct.

Q. Did you send those checks to Chicago because you were afraid of embar-assing the bank?

A. No. That question had not come into my mind at the time.

Q. As I understand it, you sent these checks to Chicago because you thought by so doing you were protecting the interests of your employers. That is the reason why you are doing it?

A. Yes.

[fol. 41] Cross-examination.

By Mr. Gillam:

Q. You do admit that you had this conversation with Mr. Yarosh on the 29th day of June, 1926?

Mr. Erdall: Object to that on the ground the witness is entitled to know just the conversation *is* referred to.

Q. You heard the testimony of Mr. Yarosh that he went over to see you on the 29th day of June?

A. Yes sir.

Q. Did he or did he not do that?

A. I do not remember the date, but I remember of him coming there.

Q. What did he say to you when he came over there?

A. I believe as near as I remember it was just as he stated in his testimony.

Q. His testimony was correct then?

A. Yes.

Q. Then his testimony was correct as to what you said, wasn't it?

A. I do not remember of making that statement that it would embar-ass the bank.

Q. You don't remember of telling him on that occasion anything about why you sent the check to Chicago?

A. As I remember, I told him I had instructions to remit the checks.

Q. Are you sure that is what you said at that time?

A. I am quite sure.

Q. Are you sure you didn't say something about embarrassing the Lombard State Bank? Will you swear, under oath, that you did not say it, Mr. Gustafson?

Mr. Erdall: That question is objected to as incompetent and improper.

The Court: Sustained.

Q. Are you sure you didn't say that to Mr. Yarosh?

A. I have no recollection of saying anything of the kind at that time.

Q. You have testified that you sent these checks and money to Chicago on the Sunday morning train on the 20th day of June, 1926?

A. Yes sir.

Q. That the remittance went forward on that train?

A. Yes.

Q. Going forward on that train when would it arrive in Chicago, in due course?

[fol. 42] A. I believe at eight o'clock the following morning.

Q. That would be Monday morning, June 21st?

A. Yes sir.

Q. I show you Plaintiffs' Exhibit C, being the check in controversy, the check for $375.96, it is hard to tell from these endorsements, but you will notice on the back there that the endorsement of the Central Trust Company of Illinois [id] dated June 22. Do you see that "22" right there?

A. I can't be certain about that.

Q. Do you say that check was put on the train so it arrived at the Central Trust Company of Illinois in Chicago on the morning of Monday, the 21st day of June?

A. I believe it should arrive at that time.

Q. So far as you know the train arrived there on time?

A. Yes, so far as I know.

Q. At any time did you ask Mr. Yarosh for cash or currency in payment of freight costs?

A. No sir.

Q. Did you ask him on Saturady, June 19th, for currency or draft?

A. No sir.

Q. You took the check as you had taken them before?

A. Yes sir.

Q. Just as you had been taking them for more than a year before.

A. Yes.

Q. And you gave him a receipt on his freight bill in return for that check? The receipted bill?

A. Yes sir.

Q. You still reside at Kimball, S. D.?

A. Yes sir.

Q. Have you a deposit in the Lombard bank?

A. No sir.

Q. Do you know whether the Lombard State Bank has paid any dividends?

A. Not to my knowledge.

Q. You don't know of anything that it has paid?

A. No sir.

Redirect examination.

By Mr. Erdall:

Q. As I understand it, you delivered this check and the other checks, to the American Railway Express Company on Sunday morning, June 20?

A. Yes sir.

Q. What they did with it after that time you don't know?

A. No.

[fol. 43] Q. That is, what the American Railway Express Company people did with it, you don't know?

A. No.

Q. As I understand it, you addressed it to the Central Trust Company of Illinois before you delivered it to the express company, at Chicago, Ill. That is, this package, you addressed it to the Central Trust Company of Ill., at Chicago?

A. Yes.

Q. I presume you don't know how many deliveries the Express Company has at Chicago, or had?

A. No.

Q. And you don't know what time the train actually arrived in Chicago?

A. No.

Q. Nor what the manner of doing business of the Express Company in Chicago is, or was?

A. No.

Q. Did you ordinarily send your remittances to the Central Trust Company of Illinois at Chicago, Illinois, by the American Railway Express?

A. Yes.

Recross-examination.

By Mr. Gillam:

Q. Who is the agent of the Express Company there at Kimball, S. D.?

A. I am.

Q. Are you paid a salary?

A. No sir.

Q. What compensation do you receive as their agent?

A. I receive ten per cent commission on the charges.

Q. On the gross business in money?

A. Yes.

Q. What express charges did you pay on this shipment on the morning of the 20th of June?

A. I didn't pay any.

Q. Was that carried free by the Express Company?

A. We bill it on a non-revenue bill. That is handled by contract as far as I know.

Q. On a non-revenue basis?

A. I presume so.

Q. So as far as you know, it didn't cost you anything to ship currency or checks or anything like that into Chicago? As far as you know?

A. No sir.

Q. Did it cost you anything to go up to the bank and get currency on checks?

A. No sir.

Q. There was no fee to be paid for that?

A. Not to my knowledge. At least I haven't paid any.

Q. Did you have to pay anything for drafts when you got drafts?

A. No sir.

Q. That didn't cost you anything?

A. No sir.

[fol. 44] Q. You say then that the reason why you sent this check of June 19, and hadn't ever sent a check of the Fullerton Lumber Company to Chicago before, was on account of the embarrassment of the bank, and on account of what you understood the instructions to be?

Mr. Erdall: Plaintiffs object to the question as misquoting the statement of the witness.

The Court: I think we have gone far enough. We have gone over that.

Witness excused.

Mr. DICKEY recalled for further examination.

By Mr. Erdall:

Q. This deposit slip Plaintiff's Exhibit D, have you seen that before?

A. Yes.

Q. From what source did you receive that?

A. From the Central Trust Company of Illinois.

Q. Do you receive statements from them showing deposits made by agents?

A. Yes.

Q. Have you a statement with you covering this particular time?

A. Yes sir.

Q. I show you Plaintiffs' Exhibit E. State what that is.

A. Statement rendered by the Central Trust Company of Illinois of the amount credited to our account from the agents of the Railway Company on June 22, 1926.

Q. Does that statement show an item of $607.39 received from the agent at Kimball, S. D.?

A. It does.

Q. Have you designated that particular item?

A. I have, by putting a red ring around it.

Q. All of these amounts, these remittances, that are shown on this statement were made direct by the agents from the points shown to the Central Trust Company of Illinois?

A. Yes.

Q. In other words the Central Trust Company of Illinois is a depository for all of the checks shown on that statement? All of the remittances?

A. Yes sir.

Plaintiffs offer in evidence Exhibit E.

Admitted without objection.

Cross-examination.

By Mr. Gillam:

Q. Did this train that left Kimball, S. D. at 10:35 Sunday morning arrive in Chicago at eight o'clock a. m. the next morning?

A. I do not know.

[fol. 45] Q. Have you personally taken up with the Fullerton Lumber Company the matter of paying this check?

A. No; I don't believe so. It was done through some one else. We first asked Mr. Gustafson to request their manager to pay it. When they declined to pay it our traffic manager up here asked them.

Mr. Erdall: They have been asked several times to pay the outstanding freight charges covered by this check?

A. Yes sir.

Mr. Gillam: Has the check been returned to the Fullerton Lumber Company?

A. No.

Q. It has not been returned?

A. It would not be returned until—unless it was paid.

Mr. Erdall: Of course we tender them the check at this time if they will pay it.

Evidence closed.

Reporter's certificate to foregoing omitted in printing.

ORDER FOR JUDGMENT

After hearing all the evidence, and the argument of Counsel, the Court took the matter under advisement and on November 20th, 1928, made its Decision and Order for Judgment in favor of Plaintiff in the sum of Three Hundred Seventy-five and 96/100 ($375.96) Dollars, with interest thereon at six per cent per annum from June 25th, 1926, together with the costs of this suit, to all of which Defendant excepted.

[fol. 46] Thereafter, Defendant duly made and filed its motion for amended findings and a new trial and thereupon

the said motion for new trial duly came on to be heard before this Court, at Des Moines, Iowa, on the 2nd day of February, 1929.

Defendant's motion for amended findings and for a new trial on the following grounds as follows:

NOTICE OF MOTION FOR AMENDED FINDINGS AND FOR NEW TRIAL

To the plaintiff above named and to Messrs. F. W. Root, C. O. Newcomb, and A. C. Erdall, its attorneys:

You are hereby notified that at a term of the above named Court, to be held at the Court House in the Federal Building in the City of Minneapolis, Hennepin County, Minnesota, on Monday, January 14th, 1929, at 10 o'clock A. M. of said day or as soon thereafter as Counsel can be heard, the above named Defendant will move the Court, for an Order striking out and cancelling the first three lines of the Seventh Paragraph of the Findings of Fact and Conclusions of Law, duly signed by Charles A. Dewey, Judge, and dated November 20, 1928, and finding in lieu thereof that Defendant was not aware that the Lombard State Bank was not in the best of financial circumstances at the time of the execution of the check.

And Defendants will further move said Court for its Order further amending said Findings of Fact and Conclusions of Law so as to find that said bill for freight involved in said action was duly and legally paid, and that Defendant is under no liability to Plaintiff, and that Defendant is entitled to judgment and for costs and disbursements.

And you are further notified that, in case said Court shall deny said Amendments to the Findings of Fact and Conclusions of Law that then and in that event that Defendant will move said Court for a new trial of said action, and for grounds of said new trial Defendant assigns error as follows:

That the Findings, Judgment, Decision and Order of the Court are not justified by the evidence, and are contrary to law, and that the Findings, Judgment, Decision and Order should have been in favor of the Defendant in said above entitled action.

And you are hereby further notified that, in case said Court shall deny said Amendments of its Findings and [fol. 47] Decision and shall deny said new trial, that then and in that event Defendant will move said Court for its Order, granting Defendant the right to amend its Answer so as to include therein a counterclaim for damages for Plaintiff's negligence in not properly dealing with or presenting for payment the check involved in said action at law, and for stay of execution of the judgment herein to and until such time as said issue of law upon said counterclaim may be properly tried and determined and that, if the decision on such counterclaim shall be in Defendant's favor, then that the amount of judgment thereon shall be set off against the amount allowed in the Findings of Facts and Conclusions of Law heretofore filed herein, and that Plaintiff shall pay to Defendant the balance thereof, if any, found to be due.

And Defendant will ask such other and further Order and relief as may be just in the premises.

Dated January 5th, 1929.

Stanley S. Gillam, Attorney for Defendant, 1014 Metropolitan Life Bldg., Minneapolis, Minnesota.

After consideration of said motion, the Court overruled the same and made its Order as follows:

ORDER SUSTAINING MOTION FOR AMENDED FINDINGS IN CERTAIN RESPECTS AND OVERRULING MOTION FOR NEW TRIAL

The motion of Defendant for amended findings and for new trial of the above entitled action duly came on to be heard before the undersigned, a Judge of the United States District Court, and the Judge who tried the said case, at the Federal Court House in the City of Des Moines, Iowa, at 10:00 o'clock A. M. on Saturday, February 2nd, 1929.

Stanley S. Gillam duly appeared on behalf of Defendant in support of said motion and there was no appearance upon behalf of Plaintiff at said hearing.

The Court, being duly advised in the premises, having read said motion papers and having heard the argument of Counsel,

It is hereby ordered:

(1) That said motion for amended findings, insofar as said motion refers to Paragraph Seven (7) of the findings, decision, judgment and order of this Court, dated Novem- [fol. 48] ber 20th, 1928, and heretofore filed herein, be, and it hereby is, granted, and Paragraph Seven (7) of said decision and findings, dated November 20th, 1928, be, and it hereby is, amended and changed so as to read as follows, in lieu of said Paragraph Seven (7) as originally written:

"The plaintiff was aware of the fact that the Lombard State Bank was not in the best of financial circumstances at the time of the execution of the check, and same was sent to the Central Trust Company of Chicago for collection under the direction of the officers of the company as they were unwilling to trust a transfer of the payment of the account to a draft drawn on the Lombard State Bank."

(2) In so far as said motion for amended findings asks that the Court find that said bill for freight, involved in this action, was duly and legally paid, the said motion for amended findings is denied, and the Court adheres to its views as set forth in said findings and decision dated November 20th, 1928, that said freight bill was not legally paid by said check therein referred to.

(3) Said motion for a new trial of said action is denied.
Dated February 2nd, 1929.
(Sgd.) Chas. A. Dewey, Judge of U. S. District Court.

PRAYER OF DEFENDANT FOR APPROVAL OF BILL OF EXCEPTIONS

Thereupon Defendants tenders this its Bill of Exceptions to the action of the Court in the various particulars therein set out.

Dated this 20th day of February, A. D. 1929.
Stanley S. Gillam, Attorney for Defendant.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS

Thereafter and on the 23rd day of February, 1929, and within proper time, the Defendant duly tendered this, its

Bill of Exceptions herein, which having been seen and examined by the Court and Counsel, is by the Court allowed and approved, and the said Bill of Exceptions is signed and sealed by the Honorable Charles A. Dewey, Judge of the [fols. 49 & 50] United States District Court, before whom said proceedings were had, and the same is ordered by said Court to be filed and made a part of the record herein, which is now accordingly done.

Given under the hand and seal of the Judge of said Court before whom said proceedings were had this 23rd day of February, 1929.

Chas. A. Dewey, Judge of United States District Court for the District of Iowa.

The above and foregoing Bill of Exceptions is hereby approved.

F. W. Root, C. O. Newcomb & A. C. Erdall, Attorneys for Plaintiff. Stanley S. Gillam, Attorney for Defendant.

Let the Bill be filed and the filing shown of record as of this 23rd day of February, 1929.

Chas. A. Dewey, Judge.

[File endorsement omitted.]

(Here follow Plaintiff's Exhibits A, B, C, and D, side folios 51 & 52, 53 & 54, 55 & 56, and 57 & 58)

[fol. 59] PLAINTIFF'S EXHIBIT E

N D N

(This exhibit is a large Journal sheet, for June 22, 1926, of the Central Trust Company of Illinois listing deposits from various stations. The relevant portion of this deposit sheet is as follows)

A-5-25-500M

Pd off of a NOW

Car # 93360

6196

Form 72-T. W.

MAKE CHECKS PAYABLE TO
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers

8629

FREIGHT BILL

KIMBALL, S. D. STATION 6-16-6 192

CONSIGNEE Fullerton Lbr Co

FREIGHT BILL NO. 374

DESTINATION

ROUTE NW-Coals. Pt-Chgo. Cons't

(POINT OF ORIGIN TO DESTINATION)

To CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, Dr., For Charges on Articles Transported:
H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers

3553

WAYBILLED FROM	WAYBILL DATE AND NO.	FULL NAME OF SHIPPER	CAR INITIALS AND NO.
North Fork W.Va.	6-9-1937	Coal by Curran +13	NW 93360
POINT AND DATE OF SHIPMENT	CONNECTING LINE REFERENCE	PREVIOUS WAYBILL REFERENCES	ORIGINAL CAR INITIALS AND NO.

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
Rom Coal	104000	7.3	37.96	✓	
Light at Ports Ohio 1432 410 102200 ✓					
RW Mitchell 1450 410 1040					
★TOTAL PREPAID $					

CLAIM
No 150216
C.M. ST. P. R'Y CO.

LOCATION		
WAREHOUSE	POST OR SECTION	

RECEIVED PAYMENT 6/19 192 6

40

F. Thompson AGENT

PER CASHIER OR COLLECTOR

TOTAL 37.96

★FOR USE AT JUNCTION POINTS ON FREIGHT SUBJECT TO CONNECTING LINE SETTLEMENT.

THE ORIGINAL PAID FREIGHT BILLS MUST BE SURRENDERED FOR OVER-CHARGES TO BE REFUNDED, AND MUST ACCOMPANY CLAIMS FOR OVER-CHARGE, LOSS OR DAMAGE.

51-52

Pl Ex B 1937

Form 72-T W.

DELIVERY RECEIPT

CONSIGNEE Fullerton Lbr Co

DESTINATION

ROUTE NTW - Cals - Plt - Chgo. Cust

(POINT OF ORIGIN TO DESTINATION)

STATION 6/16 1926

FREIGHT BILL NO. 374

Received of CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, The following Described Articles in Good Order:

H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers

WAYBILLED FROM	WAYBILL DATE AND NO.	FULL NAME OF SHIPPER	CAR INITIALS AND NO.
Northfork Wkg.	6-9-1937	Coates Clarke Co.	NTW. 9336
POINT AND DATE OF SHIPMENT	CONNECTING LINE REFERENCE	PREVIOUS WAYBILL REFERENCES	ORIGINAL CAR INITIALS AND NO.

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
Rom Coal	104000	7.23	375.96		
Light at Ports Okee 1432 410 104000					
RW Mitchell 111500 410 1640					
	TOTAL PREPAID $				

LOCATION

WAREHOUSE	POST OR SECTION

DELIVERED BY

DELIVERY CLERK

NOTICE MAILED ____ 192__

DATE OF DELIVERY 6/16 192__

RECEIPT OF PROPERTY ACKNOWLEDGED

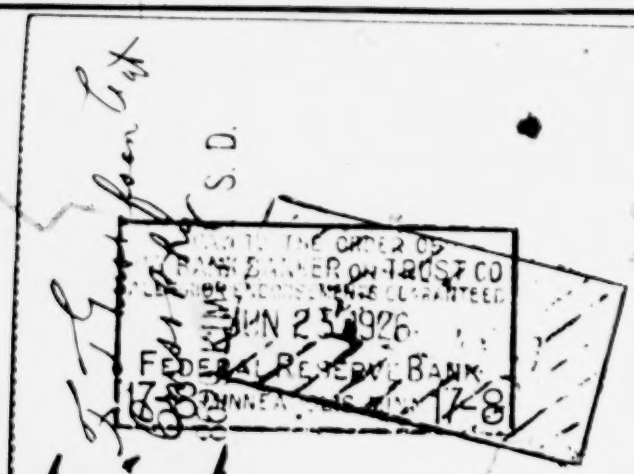
Fullerton Lbr Co. CONSIGNEE

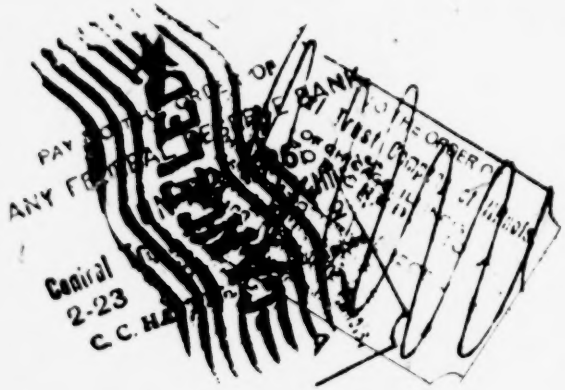
PER J E Brown

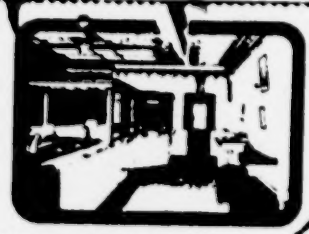
TOTAL 375.96

TO BE RETAINED FOR STATION RECORD WHEN DATED AND SIGNED BY CONSIGNEE.

53=54







PH LC

FULLERTON LUMBER COMPANY
WHOLESALE AND RETAIL LUMBER

No. 738

KIMBALL, SOUTH DAKOTA, 6/19, 1924

PAY TO THE ORDER OF C. M. & St. P. Ry. Co. $375.96

Three Hundred Seventy Five & 96/100 DOLLARS

COLLECTIBLE AT PAR THROUGH THE FEDERAL RESERVE BANK OF MINNEAPOLIS

TO THE HOLBARD STATE BANK
KIMBALL, SOUTH DAKOTA
78-196

FULLERTON LUMBER COMPANY
By J. E. Yarosh

55-56

57=58

O-4-36 10M Form 129

For Credit In June Account
MONTH

SEE RULES 614 AND 617

To be used in remitting Currency, Coin, Bank Checks, Money Orders, Pay Checks and Drafts on connecting lines.

Chicago, Milwaukee & St. Paul Railway

H. E. Byram, M. W. Potter and E. J. Brundage, Rec.
TO PUGET SOUND—ELECTRIFIED

Midwest DIVISION.

8629 KIMBALL, S. D. Station.

June 19 1926

CENTRAL TRUST CO., of ILLINOIS, Chicago

I hand you herewith the following items for credit to Chicago, Milwaukee & St. Paul Railway
H. E. Byram, M. W. Potter and E. J. Brundage, Rec.

D J Gustafson Agent

Currency, $	40	00
Gold, $		
Silver, $		
Checks, etc. (itemize) $		
Fullerton Lbr Co #7381	375	96
O J Brandel	124	16
Geo Bragg	67	27
Total, $	607	39

Agents must also show hereon:

Date of last remittance 6/18

Am't of " " $61 00

Treas. 1021

Central Trust Company of Illinois

The account of the Chicago, Milwaukee & St. Paul Railway Co. with this bank is credited being amount received today from agents as detailed below:

Chicago, Ill., June 22, 1926.

(Here folows tabulated list of a large number of stations on a Journal sheet, among which is the following:)

Station	Amount
8629 Kimball,	$607.39

Defendant's Exhibit 1

NDN No. 737

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

June 15, 1926.

Pay to the order of C., M. & St. P. Ry Co. $502.70 five hundred two & 70 100 dollars.

Collectible at par through the Federal Reserve Bank of Mpls.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid the Lumbard State Bank, Kimball, S. Dak., June 15, 1926.

Endorsed: F. T. Gustafson, Agt. C. M. & S. P. Ry.

[fol. 60] Defendant's Exhibit 2 (1 to 36 Inclusive) NDN

2-1 No. 548

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

July 11th, 1925.

Pay to the order of C., M. & St. P. Ry Co. $147.15 One Hundred Forty Seven and 15/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid the Lumbard State Bank, Kimball, S. Dak., July 13, 1925.

Endorsed: F. T. Gustafson, Agt. C. M. & St. P. Ry.

2-2.—No. 548

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

July 8th, 1925.

Pay to the Order of C., M. & St. P. Ry. Co. $220.30 Two Hundred Twenty & 30/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, S. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak., July 10, 1925.

Endorsed: F. T. Gustafson, Agt., C., M. & St. P. Ry.

Endorsed: Kimball State Bank, July 9, 1925.

[fol. 61] 2-3. No. 552

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

July 17th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $486.94 Four Hundred Eighty Six & 94/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, So. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. July 20, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.
Endorsed: Kimball State Bank, Jul. 18, 1925.

2-4. No. 564

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Aug. 6th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $164.31 One Hundred Sixty-four & 31/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.
Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 7, 1925.
Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.
Endorsed: Kimball State Bank, Aug. 6, 1925.

[fol. 62] 2-5. No.566

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Aug. 7th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $2.07 Two & 07/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.
Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 8, 1925.
Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.
Endorsed Kimball State Bank, Aug. 7, 1925.

2-6. No. —

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Aug. 10, 1925.

Pay to the Order of C. M. & St. P. Ry. Co., $144.39 One Hundred Forty-Four & 39/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 11, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed Kimball State Bank, Aug. 10, 1925.

[fol. 63] 2-7. No. 568.

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Aug. 10th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $4.09 Four & 09/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 11, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Aug. 10, 1925.

2-8. No. 570

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Aug. 14th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $393.71 Three Hundred Ninety-three & 71/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 15th, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed Kimball State Bank, Aug. 13, 1925.

[fol. 64] 2-9. No. 575

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

8/24, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $165.41 One Hundred Sixty-five & 41/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 25, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Aug. 24, 1925.

2-10. No. 577

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Aug. 27, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $408.06 Four Hundred Eight & 06/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Aug. 28, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Aug. 27, 1925.

[fol. 65] 2-11. No. 591

Fullerton Lumber Company, Wholesale and Retail Lumber,
Kimball, South Dakota

Sept. 21st, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $97.85 Ninety-seven and 85/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Sep. 22, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Sept. 21, 1925.

2-12. No. 594

Fullerton Lumber Company, Wholesale and Retail Lumber,
Kimball, South Dakota

Sept. 30th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $75.33 Seventy-five & 33/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Oct. 1, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Oct. 1, 1925.

[fol. 66] 2-13. No. 595

Fullerton Lumber Company, Wholesale and Retail Lumber,
Kimball, South Dakota

Sept. 30th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $2.25 Two and 25/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Oct. 1, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Oct. 1, 1925.

2-14. No. 602

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Oct. 13, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $634.77 Six Hundred Thirty-four & 77/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped Paid The Lumbard State Bank, Kimball, S. Dak. Oct. 15, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed Kimball State Bank, Oct. 13, 1925.

[fol. 67] 2-15. No. 604

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Oct. 16, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $271.31 Two Hundred Seventy-one and 31/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Oct. 16, 1925.

Endorsed: F. T. Gustafson, Agt. C. M. & St. P. Ry.
Endorsed: Kimball State Bank, Oct. 16, 1925.

2-16. No. 615

Fullerton Lumber Company, Wholesale and Retail Lumber,
Kimball, South Dakota

Nov. 4th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $237.71 Two Hundred Thirty Seven & 71/100 Dollars.
Collectible at Par through the Federal Reserve Bank of Minneapolis.
To the Lumbard State Bank, Kimball, South Dakota.
Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Nov. 5, 1925.
Endorsed: F. T. Gustafson, Agt. C. M. & St. P. Ry.
Endorsed: Kimball State Bank, Nov. 4, 1925.

[fol. 68] 2-17. No. 622

Fullerton Lumber Company, Wholesale and Retail Lumber,
Kimball, South Dakota

Nov. 19th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $334.23 Three Hundred Thirty-four and 23/100 Dollars.
Collectible at Par through the Federal Reserve Bank of Minneapolis.
To the Lumbard State Bank, Kimball, South Dakota.
Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Nov. 19, 1925.
Endorsed: F. T. Gustafson Agt., C. M. & St. P. Ry.
Endorsed: Kimball State Bank, Nov. 19, 1925.

2-18. No. 626

Fullerton Lumber Company, Wholesale and Retail Lumber,
Kimball, South Dakota

Nov. 23, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $2.33 Two and 33/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Nov. 24, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Nov. 23, 1925.

[fol. 69] 2-19. No. 628

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Nov. 25, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $287.68 Two Hundred Eighty Seven & 68 100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Nov. 27, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Nov. 25, 1925.

2-20. No. 629

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Nov. 25th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $3.74 Three and 74/100 Dollars.

Collectible at Par through the Federal Reserve Bank of Minneapolis.

To the Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumbar Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Nov. 27, 1925.

Endorsed: F. T. Gustafson, Agt. C. M. & St. P. Ry.

Endorsed: Kimball State Bank, Nov. 25, 1925.

[fol. 70] 2-21. No. 632

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Nov. 30, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $446.84 Four Hundred Forty-six and 84/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Nov. 30, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-22. N. 647

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Dec. 18th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $152.61 One Hundred Fifty Two & 61/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Dec. 18, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

[fol. 71] 2-23. No. 652

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Dec. 23, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $189.62 One Hundred Eighty Nine and 62/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Dec. 23, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-24. No. 653

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Dec. 24th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $118.90 One Hundred Eighteen & 90/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Dec. 24, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

[fol. 72] 2-25. No. 659

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Dec. 30th, 1925.

Pay to the Order of C. M. & St. P. Ry. Co. $186.63 One Hundred Eighty Six & 63/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Dec. 30, 1925.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-26. No. 665

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Jan. 8th, 1926.

Pay to the Order of C. M. & St. P. Ry. Co. $1.38 One and 38 100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Jan. 9, 1926.

Endorsed: F. T. Gustafson, Agt. C. M. & St. P. Ry.

[fol. 73] 2-27. No. 666

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Jan. 9, 1926.

Pay to the Order of C. M. & St. P. Ry. Co. $147.84 One Hundred Forty Seven & 84 100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Jan. 9, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-28. No.670

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Jan. 19th, 1926.

Pay to the Order of C. M. & St. P. Ry. Co. $527.07 Five Hundred Twenty Five & 07/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, S. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak., Jan. 19, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-29. No. 673

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Jan. 22, 1926.

Pay to the Order of C. M. St. P. Ry. Co. $159.71 One Hundred Fifty Nine & 71/100 Dollars.

[fol. 74] Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, S. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Jan. 22, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-30. No. 676

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Jan. 29th, 1926.

Pay to the Order of C. M. & St. P. Ry. Co., $319.97 Three Hundred Nineteen & 97/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Jan. 29, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-31. No. 681

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Feby. 6th, 1926.

Pay to the Order of C. M. St. P. Ry. Co. $89.62 Ninety-Nine & 62 100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

[fol. 75] Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Feb. 6, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-32. No. 692

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Mar. 3, 1926.

Pay to the Order of C. M. & St. P. Ry. Co. $117.39 One Hundred Seventeen & 39 100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Mar. 6, 1926, Kimball, S. Dak.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-33. No. 697

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Mar. 25th, 1926.

Pay to the Order of C. M. & St. P. Ry. Co., $247.87 Two Hundred Forty Seven & 87 /100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, S. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Mar. 25, 1926.

Endorsed F. T. Gustafson, Agt., C. M. & St. P. Ry.

[fol. 76] 2-34. No. 698

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Mar. 30th, 1926.

Pay to the Order of C. M. & St. P. Ry. Co. $312.11 Three Hundred Twelve & 11/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, So. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Mar. 30, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-35. No. 704

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

Apr. 8th, 1926.

Pay to the Order of C. M. St. P. Ry. Co. $162.19 One Hundred Sixty Two & 19/100 Dollars.

Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, So. Dak.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Apr. 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

2-36 No. 724

Fullerton Lumber Company, Wholesale and Retail Lumber, Kimball, South Dakota

May 25th, 1926.

Pay to the Order of C. M. & St. P. Ry. Co. $2.38 Two & 38/100 Dollars.

[fol. 77] Collectible at Par through The Federal Reserve Bank of Minneapolis.

To The Lumbard State Bank, Kimball, South Dakota.

Fullerton Lumber Company. J. E. Yarosh.

Stamped: Paid The Lumbard State Bank, Kimball, S. Dak. Mar. 25, 1926.

Endorsed: F. T. Gustafson, Agt., C. M. & St. P. Ry.

DEFENDANT'S EXHIBIT 3

N D N

8629 Kimball, S. D., July 12, 1926.

Fullerton Lbr. Co., Minneapolis, Minn.:

In reply to your letters July 10, your mgr., Mr. J. E. Yarosh, has paid Frt. Bill No. 50 of 7/1 Corrected frt. to $82.76 upon receipt of his memorandum showing weight of 50160. I believe I asked you to send me check or authorize Mr. Yarosh to pay—however this can be adjusted.

In regard to the returned "unpaid" check—$375.96 needless to say that I am very sorry this happened and of course had we known what was going to happen we could have probably avoided this trouble. It surely makes a bad mess of it. It should not be overlooked that the Milwaukee has suffered much loss also as well as others thru the failure of these banks. I cannot see where myself or the Company is to blame. I am advised by our Treasurer that the check was handled promptly thru the Cent'l Trust Co. of Ills. being forwarded by them upon the day received thru the regular channels for collection.

I trust you will consider the matter carefully and save unnecessary trouble by taking this check up promptly. If you will not do this, kindly advise me your refusal.

F. T. Gustafson, Agt.

[fol. 78] DEFENDANT'S EXHIBIT 4

N D N

Chicago, June 16, 1926.

Agent, Kimball, South Dakota.

DEAR SIR: I received, late last week, statement of the Lumbard State Bank dated June 8, 1926 and note that their cash reserve is very low.

Have either of the other banks, which closed in 1924 and 1925 been re-organized and re-opened? If so, I would be greatly obliged if you will send me current statement.

For the time-being, do not exchange collections in excess of $500.00 at the Lumbard State Bank. If collections are in excess of that amount, you may exchange to the amount of $500.00 and enclose draft with the balance of local checks, currency and coin to your specified depository.

I would also greatly appreciate your personal advice regarding the Lumbard State Bank and, if you feel there is any question regarding them, make remittance of your entire collections direct to your specified depository.

Due care should be taken that checks received in payment of transportation charges are from thoroughly financially responsible companies and individuals.

Yours truly, A. L. Loomis, Treasurer for Receivers.

JD ER.

Stamped: Chi. Mil. & St. P. R. R., June 18, 1926, Kimball, S. D.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Feb. 20, 1929

The Defendant in this action, in connection with his Petition for Appeal to the United States Circuit Court of Ap-

peals for the Eighth Circuit, makes the following assignment of errors which he avers occurred upon the trial of the cause, to-wit:

[fol. 79]

I

The Court erred in making said decision, dated November 20th, 1928 and filed November 22nd, 1928, in favor of Plaintiff, upon the facts found and disclosed by the evidence, and said decision should have been made in favor of Defendant, upon the evidence and facts disclosed thereby and found thereby to exist.

II

The Court erred in making the following finding in its said decision:

"The foregoing rule of the Interstate Commission has the force and effect of United States statute, and it must follow that the payment of the check was unlawful and that the plaintiff herein is entitled under the law to recover in this suit the charges for the freight which have never been legally paid. L. & N. Ry. Co. vs. U. S. 219 U. S. 468; N. Y. C. & H. RR. Co. vs. Gray, 239 U. S. 583; Eggleston vs. Plowman (S. D.) 207 N. W. 981."

III

The Court erred in ordering judgment in favor of Plaintiff and said error is contained in the last paragraph of said decision and Order dated November 20th, 1928 and filed November 22nd, 1928, as follows:

"It is therefore the Judgment And Order of the Court that the plaintiff have and recover as against the defendant a judgment in the sum of $375.96 with interest thereon at six per cent from June 25, 1926 and costs of this suit. To all of which plaintiff excepts."

IV

The Court erred in denying Defendant's motion for amended findings, which motion came on to be heard on February 2nd, 1929, said error of the Court being contained

in Paragraph Two (2) of its Order of Denial dated February 2nd, 1929, wherein the Court used the following language:

"In so far as said motion for amended findings asks that the Court find that said bill for freight, involved in this action, was duly and legally paid, the said motion for amended findings is denied, and the Court adheres to its views as set forth in said findings and decision dated November 20th, 1928, that said freight bill was not legally paid by said check therein referred to."

[fol. 80]

V

The Court erred in denying Defendant's motion for a new trial of said action, as set forth in the motion papers dated January 5th, 1929, which motion came on to be heard on February 2nd, 1929, and the Court should have granted Defendant's motion for a new trial on the ground that the Findings, Judgment, Decision and Order of said Court, filed November 22nd, 1928, are not justified by the evidence, and are contrary to Law.

VI

The Court erred in denying Defendant's motion to amend its Answer so as to include therein a counterclaim for damages for Plaintiffs negligence in not properly dealing with or presenting for payment the check involved in said action, and the Court erred, in not vacating and annulling said Judgment, and in not granting a new trial upon said issues of negligence and damage, to the end that the damage caused to Defendant by the negligence of Plaintiff, arising out of the same transaction, be determined by set-off against any amount which might be found to be due to Plaintiff upon said freight bill, upon the theory of the Court's decision; that the evidence introduced upon the issues in this action showed said negligence and damages and the reservation and qualification stated by the Court in Paragraph Twelve (12) of its said decision, dated November 20th, 1928, and filed November 22, 1928, does not adequately protect Defendant's right to litigate said question of negligence and damages and a just decision of this cause requires a more effective and adequate safeguard to litigate said ques-

tion of negligence and of damages, if the decision that said freight bill was not paid be adhered to; that a separate action for damages as allowed in the said decision of said Court would not be available or effective to protect Defendant's rights in the premises.

Wherefore the Defendant prays that the said Judgment of the District Court may be reversed.

Stanley S. Gillam, 1014 Metropolitan Life Bldg., Minneapolis, Minnesota, Attorney for Defendant.

[File endorsement omitted.]

[fol. 81] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed Feb. 20, 1929

To the Honorable District Court of the United States for the District of Minnesota, Fourth Division:

The above named Defendant, Fullerton Lumber Company, a corporation, conceiving itself aggrieved by the Order and Judgment made and entered on the 22nd day of November, 1928, in the above entitled cause, which Order and Judgment was dated November 20th, 1928, and signed by Honorable Charles A. Dewey, Judge, does hereby Appeal from said Order and Judgment to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and said Defendant prays that this Appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said Order and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

Stanley S. Gillam, 1014 Metropolitan Life Building, Minneapolis, Minnesota, Attorney for Defendant.

The foregoing Claim of Appeal is hereby allowed.

John B. Sanborn, United States District Judge.

Dated February 20, 1929.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Feb. 2, 1929

To the above named plaintiff and to Messrs. F. W. Root, C. O. Newcomb, and A. C. Erdall, its attorneys:

SIRS: You will please take notice that the above named Defendant appeals to the Circuit Court of Appeals for the Eighth Circuit, from the Order and Judgment of this Court, dated November 20th, 1928, and made and entered in the [fols. 82 & 83] above entitled cause, in the office of the Clerk of said United States District Court, Fourth Division, on November 22nd, 1928.

Dated February 18th, 1929.

Stanley S. Gillam, 1014 Metropolitan Life Bldg., Minneapolis, Minnesota, Attorney for Defendant.

Service admitted Feb. 2, 1929.

F. W. Root, C. O. Newcomb, & A. C. Erdall, Attorneys for Plaintiff.

[File endorsement omitted.]

Bond on appeal for $1,000.00, approved and filed February 25, 1929, omitted in printing.

[fol. 84] Citation, in usual form, showing service on F. W. Root et al., filed February 21, 1929, omitted in printing.

[fol. 85] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD AND ELECTION TO PRINT—Filed Mar. 29, 1929

To Joel M. Dickey, Esq., clerk of said Court, and to Thomas H. Howard, Esq., Deputy Clerk:

SIRS: You are hereby notified that we request that the Transcript of the Record upon appeal to the Circuit Court of Appeals be made up of the following:

1. Complaint.
2. Answer.
3. Reply and Stipulation for filing thereof.
4. Waiver of Jury Trial and Stipulation.
5. Judgment Roll.

[fols. 86 & 87] Assignment of Errors.

7. Petition for Appeal and Order Allowing Appeal.
8. Bond on Appeal.
9. Notice of Appeal.
10. Citation on Appeal.
11. Bill of Exceptions.
12. Praecipe for Record and Election as to Printing.
13. Exhibit.

You are hereby further notified that we elect that the Record be printed under the supervision of the Clerk of the Circuit Court of Appeals at Saint Louis.

Standley S. Gillam, 535 Metropolitan Bank Building, Minneapolis, Minn., Attorney for Defendant.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] Appearances of counsel omitted in printing.

[fol. 89] Minute entry of agreement and submission October 7, 1929, omitted in printing.

[fol. 90] In United States Circuit Court of Appeals, Eighth Circuit, October Term, A. D. 1929

No. 8572

Fullerton Lumber Company, a Corporation, Appellant,

vs.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a Corporation, Appellee

Appeal from the District Court of the United States for the District of Minnesota

Mr. Stanley S. Gillam for appellant.

Mr. A. C. Erdall (Mr. F. W. Root and Mr. C. O. Newcomb with him on the brief) for appellee.

Before Van Valkenburgh and Gardner, Circuit Judges, and Woodrough, District Judge

Opinion—Filed Nov. 15, 1929

Woodrough, District Judge, delivered the opinion of the court.

Appellant, Fullerton Lumber Company, doing business at Kimball, South Dakota, gave its check on the Lombard State Bank of that city in payment of freight charges on a car load of coal consigned to it and carried in interstate commerce. The local agent for the railroad company accepted the check as payment and receipted the freight bill. The check was not presented for payment to the bank on which it was drawn until after the bank had closed its doors [fol. 91] which was six days after delivery of the check, and consequently it was never paid although the lumber company had at all times sufficient deposit with the bank to cover it.

The suit of the railroad company was to collect the freight charges, and the lumber company pleaded in answer that the freight charges had been paid. The railroad replied that it had received the check of the lumber company but that said check was duly presented to the bank

and payment refused, and it denied that the freight charges had been paid.

The theory of the lumber company on the trial to the court (jury having been waived) was that the railroad company was negligent in not presenting the check for payment, and that under the law merchant the freight was paid. The railroad company contended that it is unlawful for it to receive or accept anything but money in payment of freight charges; that its freight charges in this instance were not so paid in money and therefore it was entitled to recover. The trial court sustained the contention and rendered judgment for the railroad company accordingly. Thereafter the lumber company moved the court for leave to amend its answer so as to include a counterclaim for damages for the railroad's negligence in not properly dealing with or presenting for payment the check involved in this action. The motion was denied and both the judgment and this ruling on the motion are presented for review.

We are satisfied that the trial court did not err in rendering judgment for the freight charges, and approve the conclusions stated by the trial court as follows:

"The Interstate Commerce Commission adopted a rule dated September 15, 1906, known as Conference Ruling 207, reading as follows:

" '207. Payment for Transportation.—Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the Commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates of fare in effect at [fol. 92] the time, precludes the acceptance of service, property, or other payment in lieu of the amount of money specified in the published schedules.' "

"The foregoing rule of the Interstate Commerce Commission has the force and effect of United States Statute, and it must follow that the payment by the check was unlawful and that the plaintiff herein is entitled under the law to recover in this suit the charges for the freight which have never been legally paid. L. & N. Ry. Co. v. U. S., 219 U. S.

486; N. Y. C. & H. R. R. Co. v. Gray, 239 U. S. 583; Eggleston v. Plowman (S. D.) 207 N. W. 981."

In the case of L. & N. R. R. v. Mottley cited by the trial court the declaration is found in the third syllabus, "the statute means that transportation shall be paid for by all alike and only in cash", and the exhaustive opinion of the court justifies and settles the conclusion. It is reiterated and adhered to in C. I. & L. Ry. Co. v. U. S., 219 U. S. 486, and followed in L. & N. Ry. Co. v. Maxwell, 237 U. S. 94 and N. Y. C. & H. R. R. Co. v. Grady, 239 U. S. 583.

In the case of Eggleston v. Plowman also cited by the trial court it appeared that a taxpayer had delivered a draft to the county treasurer in payment of taxes. The county treasurer hold the same for three weeks and until after the bank had failed. The statute of the state forbade the payment of taxes in anything but money and the court said:

"It is the usual rule, in the absence of an express agreement otherwise, that payment by draft or check is conditional payment only, ripening into absolute payment when the draft or check is in fact paid. These propositions are conceded by appellant, but he undertakes to apply to the defendant as a public official the same rule that would obtain between private individuals, and to maintain that the draft, although conditional payment when offered, yet, having been retained by the defendant instead of being refused and returned, defendant's want of diligence in presenting it for payment operates to extinguish plaintiff's obligation.

"We are of the opinion that this rule, applicable between private individuals, cannot govern as between an individual, whose duty it is under the law to pay his taxes and pay them [fol. 93] in money, and a public officer, whose duty it is to collect the taxes and collect them in money."

On the question whether a counterclaim for damages for losses arising out of the shipment may be interposed in this kind of an action to collect freight charges there is conflict of federal decisions. It appears that the trial courts in this circuit confine the issues and the trial in the cases to the

freight charges, and we think this conforms to the intent of congress reflected in the acts relating to interstate commerce. A paramount purpose of the regulation of carriers is to compel uniform treatment of shippers, and the exaction of the published freight charges in cash payment from each and all shippers alike is a necessary step. To that end carriers are compelled to sue where through mistake or otherwise an undercharge has been made or collection has failed, and such suits are often burdensome to the carriers and instituted with reluctance by them. If the suits are to afford occasion to litigate all the various claims shippers may make against carriers the whole intent and purpose of congress will be defeated. Instead of an aid to the uniform collection of the same cash charges from all shippers the suits would inevitably open the door to gross discriminations under color of counterclaims and offsets which the courts could not prevent In fact a measure of discrimination is present as soon as a counterclaim is permitted in a carrier's suit for freight charges. Shippers who have rare dealings with carriers and no claims must submit to judgment as soon as their cases are reached and their debt for freight charges proved against them. Other shippers who have frequent dealings and claims may wait until issues are formulated upon their counterclaims or offsets and then they can not be adjudged to pay their freight charges until all such matters of counterclaim and offset have also been litigated and determined. At the end of the litigation such shippers, if successful, will not be compelled like others to pay their freight charges in cash but their freight bills will practically be otherwise discharged. Discriminations and preferences have taken many forms in the past and the intention of congress to abolish them all is clear. The federal courts are also bound to the same purpose, and, as the practice of permitting counterclaims in these suits tends to defeat the purpose the practice should not be permitted even though there is a statute of the state sanctioning counterclaims generally in law actions.

[fol. 94] We agree with the conclusions of Judge Munger in C. & N. W. Ry. Co. v. Stein, 233 Fed. 716; Judge Wade in Illinois Central R. R. Co. v. Hoopes, 233 Fed. 135, and Judge Cochran in Penn. R. R. Co. v. So. Car. Produce Ass'n,

25 Fed. (2d) 315. The decisions to the contrary have received careful consideration but we do not deem them controlling. C. & N. W. Ry. Co. v. Tecktonius Mfg. Co., 262 Fed. 715; Wells Fargo Co. Cuneo, 241 Fed. 727; Payne v. Clarke, 271 Fed. 525; Nashville C. & St. L. Ry. Co. v. Tennessee Mill Co., 227 S. W. 443. The trial court rightly denied the motion to permit a counterclaim to be presented.

The following paragraph appears in the "Findings of Fact and Conclusions of Law" made by the trial court:

"This decision and the following judgment is made without prejudice to the defendant to bring an action against the plaintiff or its assignor for loss resulting from the failure to present the check for payment within a reasonable time, or any other negligence or negligent acts on the part of this plaintiff or its assignor."

The judgment following is in the ordinary form of money judgment for the amount due, interest and costs, and awarding execution.

This court affirms the judgment entered by the trial court because the evidence and facts found compelled that judgment.

We express no opinion as to the effects of the litigation in any other controversy that may arise between the parties.

The judgment is affirmed.

[fol. 95] In United States Circuit Court of Appeals
Eighth Circuit

No. 8572

Fullerton Lumber Company, a Corporation, Appellant,

vs.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a Corporation

Appeal from the District Court of the United States for the District of Minnesota

Judgment—Nov. 16, 1929

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, a corporation, have and recover against the Fullerton Lumber Company, a corporation, the sum of Twenty Dollars for its costs herein and have execution therefor.

[fol. 96] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 97] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 17, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,795. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 664. Fullerton Lumber Company, petitioner, vs. Chicago, Milwaukee, St. Paul & Pacile Railroad Company. Petition for writ of certiorari and exhibit thereto. Filed February 14, 1930. File No. 34,795.